Supreme Court, U.S.
FILED

04 736 NOV 30 2004

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No.

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CANADA, INC. AND MERCEDES-BENZ CANADA, INC.,

Petitioners,

v.

GEORGE JAYNES, ET AL.,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The District Court denied Petitioners' motions to dismiss for lack of personal jurisdiction in this putative antitrust conspiracy class action, but certified "a controlling question of law as to which there is substantial ground for difference of opinion" concerning the proper interpretation of Section 12 of the Clayton Act, 15 U.S.C. § 22 – the Clayton Act's extra-territorial or "worldwide service of process" provision. The Circuits are sharply divided on this question. Unlike nearly every other federal Court of Appeals that has been presented with this question, the First Circuit declined to address this pure question of law on interlocutory appeal.

The question presented is:

Does the second clause of Section 12 of the Clayton Act, 15 U.S.C. § 22 – the Clayton Act's "worldwide service of process provision" – permit district courts to exercise personal jurisdiction over corporate defendants absent any showing that venue exists under the first clause of Section 12 and based solely on the corporation's aggregate contacts with the United States as a whole, rather than contacts with the district or with the State in which that district court sits?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner and Defendant DaimlerChrysler Canada, Inc. ("Daimler Canada"), a corporation organized under the Canada Business Corporations Act, is a wholly owned subsidiary of DaimlerChrysler Corporation, a Delaware corporation that is wholly owned by DaimlerChrysler Motors Company, LLC, a Michigan limited liability company that is wholly owned by DaimlerChrysler North America Holding Corporation ("DC NA"), a Delaware corporation. DC NA is a wholly owned subsidiary of DaimlerChrysler AG, a publicly-traded stock corporation organized under the laws of the Federal Republic of Germany.

Petitioner and Defendant Mercedes-Benz Canada, Inc. ("Mercedes Canada"), a corporation organized under the Canada Business Corporations Act, is a wholly owned subsidiary of DC NA.

Respondents George C. Jaynes, Jane A. Jaynes, Cathy-Ann Accomando, Richard Jaffe, Lisa Saizon, Daniel E. Herschberg, Deborah McComb, Andre Rodriguez, Barry Cushner, Jeffrey Coe, Bruce B. Belodoff, Lisa Baade, and Perry Sadoff are natural persons.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. A DEEP AND LINGERING CONFLICT OF AUTHORITY PERSISTS AMONGST THE COURTS OF APPEALS REGARDING THE PROPER INTERPRETATION OF SECTION 12 OF THE CLAYTON ACT, WHICH RAISES SIGNIFICANT CONSTITUTIONAL AND INTERNATIONAL COMITY CONCERNS 8

A. The Circuits Are Split On How To Interpret Section 12 of the Clayton Act 8

B. The Circuit Split Regarding The Correct Interpretation Of Section 12 Of The Clayton Act Raises Significant Constitutional and International Comity Concerns 22

II. THERE IS NO REASON TO DEFER REVIEW OF THE PURE QUESTION OF LAW PRESENTED IN THIS PETITION UNTIL THE ENTRY OF FINAL JUDGMENT IN THIS CASE 27

CONCLUSION 29

TABLE OF AUTHORITIES

Pages

CASES

Action Embroidery Corp. v. Atlantic Embroidery, Inc.,
368 F.3d 1174 (9th Cir. 2004) 10, 26, 28

Amtrol, Inc. v. Vent-Rite Valve Corp.,
1986 U.S. Dist. LEXIS 25340
(D. Mass. May 19, 1986) 20

Aro Manufacturing v. Automobile Body Research Corp.,
352 F.2d 400 (1st Cir. 1965) 16, 28

Asahi Metal Industry Co., Ltd. v. Superior Court of California,
480 U.S. 102 (1986) 22, 27

Ballard v. Blue Shield of Southern West Virginia, Inc.,
543 F.2d 1075 (4th Cir. 1976) 15, 16

Board of County Commissioners of the County of Chester v. Wilshire Oil Co. of Texas,
523 F.2d 125 (10th Cir. 1975) 15, 16

Brunette Machine Works, Ltd. v. Kockum Industries, Inc.,
406 U.S. 706 (1972) 9, 11

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 25

Busch v. Buchman, Buchman & O'Brien,
11 F.3d 1255 (5th Cir. 1994) 24

Chrysler Corp. v. Fedders Corp.,
643 F.2d 1229 (6th Cir. 1981) 17

Dakota Indus., Inc. v. Dakota Sportswear, Inc.,
946 F.2d 1384 (8th Cir. 1991) 24

Daniel v. American Bd. of Emergency Medicine,
988 F. Supp. 127 (W.D.N.Y. 1996) 20

Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.,
982 F. Supp. 1138 (E.D. Va. 1997).....20

Delong Equipment Co. v. Washington Mills Abrasive Co.,
840 F.2d 843 (11th Cir. 1988).....11, 12, 28

F. Hoffman-La Roche Ltd. v. Empagran S.A.,
No. 03-724 (U.S. Jun. 14, 2004) 26

Federal Trade Comm'n v. Jim Walter Corp.,
651 F.2d 251 (5th Cir. Unit A 1981).....25

General Electric Co. v. Bucyrus-Erie Co.,
550 F. Supp. 1037 (S.D.N.Y. 1982).....19

Goldlawr, Inc. v. Heiman,
288 F.2d 579 (2d Cir. 1961),
rev'd on other grounds, 369 U.S. 463 (1962) .....*passim*

Go-Video, Inc. v. Akai Elec. Co., Ltd.,
885 F.2d 1406 (9th Cir. 1989).....*passim*

Grosser v. Commodity Exch., Inc.,
639 F. Supp. 1293 (S.D.N.Y. 1986).....22

GTE New Media Servs. v. Bellsouth Corp.,
199 F.3d 1343 (D.C. Cir. 2000) .....*passim*

Hoffman Motors Corp. v. Alfa Romeo S.p.A.,
244 F. Supp. 70 (S.D.N.Y. 1965).....21

Icon Indus. Controls Corp. v. Cimetrix, Inc.,
921 F. Supp. 375 (W.D. La. 1996).....20

In re Auto. Refinishing Paint Antitrust Litig.,
358 F.3d 288 (3d Cir. 2004).....4, 11, 23, 27

In re Magnetic Audiotape Antitrust Litigation,
334 F.3d 204 (2d Cir. 2003).....17

In re Plastic Bag Production Patent and Antitrust Litigation,
1987 U.S. Dist. LEXIS 3881
(D. Mass. Apr. 24, 1987).....20

In re Vitamins Antitrust Litigation,
94 F. Supp. 2d 26 (D.D.C. 2000) 9

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 24, 25

International Shoe Co. v. Washington,
326 U.S. 310 (1945) 25

King v. Johnson Wax Associates, Inc.,
565 F. Supp. 711 (D. Md. 1983) 20

Kingsepp v. Wesleyan Univ.,
763 F. Supp. 22 (S.D.N.Y. 1991) 20

Lerfeld v. General Motors Corp., et al.,
No. CT03-003327 (Hennepin Co. Dist. Ct. Minn. Nov. 14, 2003) 26

Leroy v. Great Western United Corp.,
443 U.S. 173 (1979) 18

Management Insights, Inc. v. CIC Enterprises, Inc.,
194 F. Supp. 2d 520 (N.D. Tex. 2001) 21

Mariash v. Morrill,
496 F.2d 1138 (2d Cir. 1974) 26

Maxwell v. General Motors Corp., et al.,
No. CV 2003-003925 (Sup. Ct. Maricopa Co. Ariz. May 6, 2004) 26

Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
709 F. Supp. 1279 (S.D.N.Y. 1989) 22

Miller Pipeline Corp. v. British Gas,
901 F. Supp. 1416 (S.D. Ind. 1995) 20

Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.,
484 U.S. 97 (1987) 23

Paltre v. General Motors Corp.,
Index No. 005014/2003 (Sup. Ct. Nassau Co.
New York, Apr. 21, 2004).....26

Paper Sys. Inc. v. Mitsubishi Corp.,
967 F. Supp. 364 (E.D. Wisc. 1997).....20

Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,
119 F.3d 935 (11th Cir. 1987).....24, 28

Reynolds Metal Co. v. Columbia Gas Sys., Inc.,
694 F. Supp. 1248 (E.D. Va. 1988).....22

Sanderson v. Spectrum Labs, Inc.,
2000 U.S. App. LEXIS 34058
(7th Cir. Dec. 29, 2000).....16, 17

Scriptomatic, Inc. v. Agfa-Gevaert, Inc.,
1973 WL 830 (S.D.N.Y. Jun. 28, 1973).....21

Sea-Roy Corp. v. Parts R Parts, Inc.,
1996 U.S. Dist. LEXIS 13565
(M.D.N.C. Jul. 30, 1996).....22

Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.,
647 F.2d 200 (D.C. Cir. 1981).....25

United Phosphorus, Ltd. v. Angus Chem. Co.,
43 F. Supp. 2d 904 (N.D. Ill. 1999).....20

Wilson v. General Motors Corp., et al.,
No. L-1287-03 (Super. Ct. Camden Co.
New Jersey Oct. 3, 2003).....26

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980).....28

Yellow Page Solutions, Inc. v. Bell Atlantic Yellow Pages Co.,
2001 WL 1468168 (S.D.N.Y. Nov. 19, 2001).....22

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V. 1

STATUTES

15 U.S.C. § 1 3

15 U.S.C. § 22 ..... *passim*

28 U.S.C. § 1254 1

28 U.S.C. § 1292 ..... 1, 6

28 U.S.C. § 1391 ..... *passim*

28 U.S.C. § 1392 15

28 U.S.C. § 1406 14

RULES

Fed. R. Civ. P. 12 ..... 2, 4, 5, 6, 28

Fed. R. Civ. P. 4 3

OTHER AUTHORITIES

Herbert Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis,* 67 IOWA L. REV. 485 (1981-82) 17, 18, 27

Jordan G. Lee, *Section 12 of the Clayton Act: When Can Worldwide Service of Process Allow Suit In Any District?* 56 FLA. L. REV. 673 (2004) 17

Von Kalinowski, 10 *Antitrust Laws and Trade Regulation*, § 1.06 (2d ed. 1999) 17

Webster's Third International Dictionary (unabr. ed. 1963) 19

PETITION FOR A WRIT OF CERTIORARI

Petitioners DaimlerChrysler Canada, Inc. and Mercedes-Benz Canada, Inc. (collectively, "Daimler/Mercedes Canada") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS AND ORDERS BELOW

The First Circuit's August 3, 2004 judgment declining to accept the issue certified by the District Court for interlocutory appeal under 28 U.S.C. § 1292(b) (Pet. App. 1a) is unreported. The District Court's March 4, 2004 opinion and order denying Daimler Canada's motion to dismiss for lack of personal jurisdiction and deferring a ruling on Mercedes Canada's motion to dismiss for lack of personal jurisdiction pending jurisdictional discovery (Pet. App. 2a) is reported at 307 F. Supp. 2d 145. On April 20, 2004, the District Court amended its March 4, 2004 order to certify, under 28 U.S.C. § 1292(b), "a controlling question of law as to which there is substantial ground for difference of opinion" for interlocutory appeal to the First Circuit. That April 20, 2004 order (Pet. App. 26a) is unreported.

JURISDICTION

The First Circuit entered its judgment on August 3, 2004. On October 20, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 1, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. V.

Section 12 of the Clayton Act, ch. 323, 38 Stat. 730 (1914) provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22.

STATEMENT OF THE CASE

The second clause of Section 12 of the Clayton Act provides for the assertion of personal jurisdiction over corporate defendants through extraterritorial, worldwide service of process "wherever [such defendants] may be found." 15 U.S.C. § 22. This case concerns whether this provision found in the second clause of Section 12 may be shorn from the first part of the sentence to which it refers, and then combined with general venue provisions that are broader than the special venue provision found in the first clause of Section 12. Specifically, this case presents the question whether the second clause of Section 12 may be combined with the alien venue statute, which provides that "[a]n alien may be sued in any district," 28 U.S.C. § 1391(d), so as to render foreign corporations, such as Petitioners Daimler/Mercedes Canada, amenable to suit in *any* judicial district of the United States, irrespective of whether those corporations have any contacts with that district or with the State in which that district court sits.

1. In 2003, Petitioners Daimler/Mercedes Canada, along with some of their Canadian corporate co-defendants,[1] moved under Federal Rule of Civil Procedure 12(b)(2) to dismiss for lack of personal jurisdiction the twenty-six cases that had been transferred by the Judicial Panel on Multidis-

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[1] These other co-defendants include Toyota Canada, Inc. ("Toyota Canada"), Nissan Canada, Inc. ("Nissan Canada"), BMW Canada, Inc. ("BMW Canada"), and the Canadian Automobile Dealers Association ("CADA"). Pet. App. 3a.

trict Litigation to the United States District Court for the District of Maine for pretrial proceedings. Pet. App. 3a. The complaints in these cases, brought by "[n]ew motor vehicle purchasers and lessees," basically allege that "American and Canadian car manufacturers, distributors, dealers . . . and dealer associations conspired to prevent a discount distribution channel from operating in the United States" by prohibiting the "entry into the American market" of "cheaper Canadian versions of various models." Pet. App. 2a.[2] When the District Court ruled on Petitioners' motions to dismiss for lack of personal jurisdiction, Respondents' complaint stated only a federal-law claim under Section 1 of the Sherman Act, 15 U.S.C. § 1.[3]

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[2] Plaintiffs eschewed reliance on the long-arm statute of any State, but also did not attempt to establish personal jurisdiction under Fed. R. Civ. P. 4(k)(2)'s provision for "claims arising under federal law" against a defendant "who is not subject to the jurisdiction of the courts of general jurisdiction of any state." Pet. App. 3a. Instead, Plaintiffs simply asserted the existence of *national* minimum contacts in very broad terms. The District Court balked at Plaintiffs' suggestion that general jurisdiction existed because "the defendants benefited from international agreements designed for the automotive industry such as NAFTA and Auto Pact; substantial automotive trade goes on between the United States and Canada; and complex corporate structures camouflage the reality of United States trade." Pet. App. 8a (citation omitted). The District Court did, however, accept the contention that specific jurisdiction existed based only on a *prima facie* showing that a defendant "engaged in a two-channel distribution system by which vehicles they manufacture flow into" any part of "the United States" "at higher prices; while the same vehicles, distributed in Canada at lower prices, are forbidden export to the United States." Pet. App. 16a-17a; *see infra*, at 5.

[3] After the District Court ruled that injunctive, but not monetary, relief would be available under Respondents' Sherman Act claim, Respondents amended their complaint "to add various state law claims" "under state antitrust statutes, consumer protection statutes and the common law of unjust enrichment" "that would allow a monetary recovery." Pet. App. 28a, 30a.

2. On March 4, 2004, the District Court denied Daimler Canada's motion to dismiss for lack of personal jurisdiction, and deferred ruling on Mercedes Canada's similar motion pending jurisdictional discovery. Pet. App. 24a.[4]

After stating that "[t]he cases are unanimous" that "[t]he clause before the semi-colon" in Section 12 of the Clayton Act "is a venue provision" and "[t]he clause following the semi-colon is a [personal] jurisdiction/service of process provision," Chief Judge Hornby stated that "courts have struggled for years with the meaning of the second clause's limiting phrase 'in such cases'":

> Does "such cases" mean antitrust lawsuits against a corporate defendant? Or does it mean only antitrust cases against a corporate defendant that meet all the criteria of the first clause, *i.e.*, where venue is established on the criteria set out there? The question is important because there is a separate venue statute that is broader for alien defendants, permitting venue over alien defendants in any district. See 28 U.S.C. § 1391(d). *If plaintiffs can use the alien venue statute in combination with section 12's service of process provision, they can sue an alien corporate defendant in federal court anywhere in the United States, subject to constitutional limitations, and serve that defendant anywhere in the world. . . .*

Pet. App. 4a-5a (emphases added).

The District Court noted that "the First Circuit has not spoken on the issue," and also recognized a near-even split of the Circuits that have. Pet. App. 5a (citing *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288 (3d Cir. 2004); *GTE New Media Servs. v. Bellsouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000); *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1413 (9th Cir. 1989)). Finding the reasoning

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[4] The court also denied the Rule 12(b)(2) motion brought by CADA, but granted the 12(b)(2) motions brought by Nissan Canada, BMW Canada, and Toyota Canada. Pet. App. 3a.

of the Third and Ninth Circuits "persuasive," Chief Judge Hornby "conclud[ed] that the second, worldwide service, clause of section 12 is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with the alien venue statute." Pet. App. 6a.

The court then eschewed "the traditional Fourteenth Amendment due process analysis that deals with the power of the individual states," and undertook an aggregate nationwide minimum contacts analysis that it regarded as comporting with the Fifth Amendment. Pet. App. 6a-7a (citations omitted) (evaluating "whether a particular defendant has sufficient contacts with the United States as a whole to justify the assertion of federal court jurisdiction over it"); *see also* Pet. App. 7a (acknowledging that "[t]he Supreme Court has not spoken to this issue").

Applying this test, the District Court found that Daimler Canada had sufficient minimum contacts with the United States as a whole, given the *prima facie* "evidence of targeted distribution and non-export agreements" that allegedly "ensure[d] that only the higher priced version of the same product can be sold to American consumers." Pet. App. 19a.[5]

The District Court "defer[red] action on [Mercedes Canada]'s 12(b)(2) motion to dismiss for lack of personal jurisdiction pending jurisdictional discovery," finding that such "discovery is warranted, given . . . that [Mercedes Canada]

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[5] The court made such a finding even though it is undisputed that Daimler Canada does not export any of its vehicles to the United States; rather, a separate but related corporate entity actually purchases the vehicles from Daimler Canada and then imports them into the United States. Pet. App. 18a. Moreover, the vehicles that are imported into the United States are not alleged to have been the source of the harm to Plaintiffs. Instead, Plaintiffs assert that they were harmed by vehicles that were not permitted to be exported to the United States.

does sell some vehicles for distribution in the United States." Pet. App. 22a.[6]

3. The District Court certified its ruling on Section 12 of the Clayton Act for interlocutory appeal under 28 U.S.C. § 1292(b) to the First Circuit on April 20, 2004. Pet. App. 26a-27a. Chief Judge Hornby determined that his March 4, 2004 order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and there is "disagreement among the Circuits." *Id.* at 27a. Reiterating his earlier order, Chief Judge Hornby stated that "[t]he First Circuit has not addressed the issue." *Id.*

He further explained that "[a]n immediate appeal from the Order of March 4, 2004 . . . may . . . materially advance" "the ultimate termination of the complex multidistrict litigation now before this court" "as to these two Canadian parties [Petitioners Daimler/Mercedes Canada], because if they are successful on their appeal of this issue, the litigation will terminate as to them." Pet. App. 27a.

5. On August 3, 2004, a panel of the First Circuit (Torruella, Selya, and Howard, JJ.) entered its judgment declining to hear the interlocutory appeal that had been certified by Chief Judge Hornby. In an order signed by an Appeals Attorney on behalf of the Clerk of the Court of Appeals, the First Circuit tersely stated:

> We decline, in the exercise of our discretion, to accept this issue for interlocutory appeal under 28 U.S.C. § 1292(b).

Pet. App. 1a.

6. On October 8, 2004, Petitioners timely filed an application for an extension of time to file a petition for a writ of certiorari. Justice Souter granted that application on Octo-

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[6] The District Court has yet to render a dispositive ruling on Mercedes Canada's Rule 12(b)(2) motion to dismiss, as jurisdictional discovery is still ongoing.

ber 20, 2004, extending the time in which to file the instant petition to and including December 1, 2004.

REASONS FOR GRANTING THE WRIT

Review is warranted in this case to provide the lower courts with much-needed guidance over an important and recurring question of federal antitrust law. A clear, well-developed, and deep split exists amongst the Circuits concerning the proper interpretation of Section 12 of the Clayton Act. Moreover, the view adopted in this case has significant constitutional and international comity implications when foreign corporations, such as Petitioners, are sued under United States antitrust laws and under a wide variety of "pendent" state-law claims in a federal judicial district and State with which they have no contacts.

The kind of patently unfair and arguably unconstitutional outcome that has resulted in this case will continue to arise in the future if courts, like the District Court in this case, are permitted to follow the Ninth Circuit's lead in tearing apart the two clauses comprising Section 12's single sentence and conjoining the second worldwide-service-of-process clause with general venue statutes such as the alien venue statute (28 U.S.C. § 1391(d)), which authorizes venue in any federal judicial district. Such a Frankenstein-like operation disconnects the second clause of Section 12's far-reaching extraterritorial-service-of-process provision from the first clause's special venue provision and renders the first clause wholly superfluous.

This Court should not defer review until the First Circuit has entered a final judgment in this case. Nearly every Circuit to have addressed the pure question of law certified by the District Court in this case has done so on *interlocutory appeal*. *See infra*, at 27-28 (citations omitted). Immediate appellate review is warranted because the proper interpretation of Section 12 of the Clayton Act involves questions of personal jurisdiction and venue – defenses that are designed to protect defendants from the burden of having to defend suit in a forum with which they do not have sufficient con-

tacts or in which it would be unfair to require the defendants to appear generally. To require Petitioners to endure a costly trial and related proceedings in this multi-million-dollar lawsuit and to overcome the pressure to settle such a high-stakes lawsuit in the interim before their defense of lack of personal jurisdiction can be vindicated would inflict upon Petitioners the very damage and injury against which the defense of lack of personal jurisdiction was designed to protect.

I. A DEEP AND LINGERING CONFLICT OF AUTHORITY PERSISTS AMONGST THE COURTS OF APPEALS REGARDING THE PROPER INTERPRETATION OF SECTION 12 OF THE CLAYTON ACT, WHICH RAISES SIGNIFICANT CONSTITUTIONAL AND INTERNATIONAL COMITY CONCERNS

The question whether the worldwide-service-of-process clause can properly be shorn of the rest of the sentence of which it is a part and combined with general venue statutes such as 28 U.S.C. § 1391(d) to authorize antitrust plaintiffs to select any district court anywhere in the United States in which to proceed against foreign corporations is ripe for, and deserving of, this Court's review at this time.

A. The Circuits Are Split On How To Interpret Section 12 of the Clayton Act.

There is at least a 3-2 split amongst the Circuits regarding whether the special extraterritorial service of process language in Section 12 applies to cases that do not satisfy the venue requirements of that same provision. This circuit split has been noted by at least two other Circuits as well as in academic commentary, and it has bred confusion and divergent outcomes amongst district courts across the country.

1. The interpretation of Section 12 left intact by the First Circuit was largely pioneered by the Ninth Circuit, which held in *Go-Video, Inc. v. Akai Electric Co., Ltd.*, that antitrust plaintiffs may serve process under the second, worldwide-service-of-process clause of Section 12 "in cases where

venue is not established under that section but lies properly under 28 U.S.C. § 1391(d)." 885 F.2d 1406, 1407-13 (9th Cir. 1989). Rejecting the argument "that section 12 of the Clayton Act must be read as an 'integrated whole,' requiring every antitrust plaintiff to satisfy the section's venue provision if it is to avail itself of its worldwide service of process authorization," Judge Reinhardt adopted an interpretation of the statute that he candidly acknowledged would render "the venue provisio[n] of section 12 'wholly redundant.'" 885 F.2d at 1408, 1413 (quoting 15 Wright & Miller, § 3818 at 110). He did so because, "as a general matter, courts have interpreted special venue provisions to supplement, rather than preempt, general venue statutes." 885 F.2d at 1409 (citing 15 Wright & Miller, *Federal Practice and Procedure*, § 3818 at 108-109 (1976)).

Judge Reinhardt relied specifically on this Court's decision in *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U.S. 706 (1972), even though in that decision, "service of process" had already been validly effectuated "under [the applicable state] long-arm statute," and even though the patent statute at issue in *Brunette* did not, like Section 12, consist of two clauses linked together in the same sentence governing both personal jurisdiction and venue. 406 U.S. at 706-07 (citing Ore. Rev. Stat. § 14.035 and 28 U.S.C. § 1400(b)); *see also In re Vitamins Antitrust Litigation*, 94 F. Supp. 2d 26, 30 (D.D.C. 2000) (explaining that "*Brunette* addresses the choice of venue where valid service already has been made," "whereas" cases such as *Go-Video* deal with "when Section 12's service provision is used as a basis for personal jurisdiction"). Judge Reinhardt also relied on "the purpose of the Clayton Act . . . to expand the reach of the antitrust laws and make it easier for plaintiffs to sue for antitrust violations." 885 F.2d at 1412-13 (citing *United States v. Scophony Corp.*, 333 U.S. 795, 806-08 (1948)).

Earlier this year, the Ninth Circuit extended its holding in *Go-Video* that Section 12's second clause may be used to effectuate extraterritorial service of process over a corporation without any showing that the corporation "is an inhabi-

tant" of "the judicial district," or "may be found or transacts business" in that district, as required by the first clause of Section 12. *See Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174 (9th Cir. 2004). Adhering to its earlier "refus[al] to read Section 12 as 'an integrated whole,'" the Ninth Circuit held that Section 12's second, worldwide-service-of-process clause may be used when Section 12's first clause has not been satisfied, even when 28 U.S.C. § 1391(d) is unavailable, as in the case of nonresident domestic corporations. 368 F.3d at 1177-80. In doing so, the Ninth Circuit invoked "the Clayton Act's legislative history" for the proposition "'that Congress viewed the questions of venue and service of process separately.'" *Id.* at 1178 (citing *Go-Video*, 885 F.2d at 1410). Judge William Fletcher reasoned as follows:

> The juxtaposition of the venue and service of process provisions in section 12, without more, does not convince us that Congress intended to make these concepts analytically interdependent, rendering a court's exercise of personal jurisdiction over an antitrust defendant dependent on the propriety of venue. Without a clear indication from Congress that it intended to do so, we will not blur the basic, historic difference between these discrete concepts and what is required for their satisfaction. We therefore hold that under section 12 of the Clayton Act, the existence of personal jurisdiction over an antitrust defendant does not depend upon there being proper venue in that court.

368 F.3d at 1179-80.

The Ninth Circuit is not alone in its steadfast refusal to read the single sentence constituting Section 12 as "an integrated whole." Earlier this year, the Third Circuit joined the Ninth Circuit in holding that: (i) "worldwide service of process authorized under Section 12 . . . upon foreign corporations is independent of the specific venue provision contained in that statute," and (ii) "a federal court's personal jurisdic-

tion over a foreign corporation in antitrust litigation may be predicated on the foreign corporation's contacts with the United States as a whole (national contacts analysis), rather than with the specific forum in which the court sits (local contact analysis)." *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 290 (3d Cir. 2004).

Judge Rosenn began by explaining that Section 12 "consists of two separate clauses, the first relating to venue and the second concerning service of process and, therefore, personal jurisdiction." *Id.* at 293. He frankly acknowledged that "if there is no specific venue limitation in federal antitrust litigation involving a foreign corporate defendant, the defendant can be sued in *any* federal district court based on its aggregate contacts with the United States as a whole." *Id.* at 292 (emphasis added). Judge Rosenn found the prospect of such unrestrained forum-shopping by plaintiffs unproblematic. He agreed with those courts that have held that the phrase "in such cases" in Section 12's second clause refers to only part of Section 12's first clause (namely, the phrase "[a]ny suit, action, or proceeding under the antitrust laws against a corporation"), rather than the category of cases comprised by the entirety of Section 12's first clause. *See id.* at 293-97. He did so largely in reliance on the *Go-Video* Court's analysis, particularly its discussion of this Court's decision in *Brunette*. *See id.* at 295-97.

The one other appellate court to squarely join in this interpretation of Section 12 is the Eleventh Circuit. It did so, however, with little or no analysis, in *Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843 (11th Cir. 1988), a case that predated the Ninth Circuit's decision in *Go-Video*. In *Delong*, the Eleventh Circuit, citing a footnote in one of its earlier decisions as well as a decision from the Northern District of Georgia, stated that "'the majority of courts considering the joint operation of the venue provisions of the Clayton Act and § 1391(b) have held that the Clayton Act's specific venue provisions do not "abolish or supersede the available districts mentioned in the general venue provisions of § 1391(b)."'" 840 F.2d at 855 n.16 (citing *L.A.*

Draper & Son v. WheelabratorFrye, Inc., 735 F.2d 414, 417 n.3 (11th Cir. 1984), and *Vest v. Waring*, 565 F. Supp. 674 (N.D. Ga. 1983)). On this basis, the Eleventh Circuit "conclude[d] that venue is established under the general federal venue statute" against the nonresident corporate defendant, which was properly served under "the nationwide service of process provision of the Clayton Act, 15 U.S.C. § 22." 840 F.2d at 855 n.15, 848.

In sum, the Third, Ninth, and Eleventh Circuits have squarely held that personal jurisdiction may be obtained in cases that do not satisfy the relevant state long-arm statute by using the worldwide-service-of-process provision found in Section 12's second clause, even though the defendant corporation is not an inhabitant of, nor may be found or transacts business in, the judicial district, as required by the venue requirements of Section 12's first clause.

2. Two other circuits have reached the opposite conclusion. The District of Columbia Circuit has explicitly rejected this "tortured interpretation of Section 12," and held that antitrust plaintiffs may not rely on the special worldwide-service-of-process provision found in Section 12's second clause without satisfying the venue requirements of Section 12's first clause. *GTE New Media Services Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1345, 1351 (D.C. Cir. 2000). Chief Judge Edwards cogently explained the interrelationship of the two halves of the single sentence that constitutes Section 12:

> The language of the statute is plain, and its meaning seems clear: The clause before the semi-colon relates to a supplemental basis for venue in actions under the Clayton Act; the clause after the semi-colon relates to nationwide service of process in antitrust cases; and invocation of the nationwide service clause rests on satisfying the venue provision.
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> . . .
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> In *Go-Video*, the Ninth Circuit rejected the argument that Section 12 must be read as an "integrated

> whole," even though the reference to serving process "in such cases" clearly seems to require that the preceding clause's venue requirements be established before nationwide service can be authorized. The court reasoned that "as a general matter, courts have interpreted special venue provisions to supplement, rather than preempt, general venue statutes." . . .
>
> The desire to view Section 12's venue provision as expansive does not justify the Ninth Circuit's total disregard of the first clause, particularly given the literal convolutions required to jettison the first clause. *Indeed, it seems quite unreasonable to presume that Congress would intentionally craft a two-pronged provision with a superfluous first clause, ostensibly link the two provisions with the "in such cases" language, but nonetheless fail to indicate clearly anywhere that it intended the first clause to be disposable.*

199 F.3d at 1350-51 (emphasis added); *see also id.* at 1351 ("A party seeking to take advantage of Section 12's liberalized service provisions must follow the dictates of both of its clauses. To read the statute otherwise would be to ignore its plain meaning.").

The District of Columbia Circuit also drew support for its well-reasoned interpretation of Section 12 from "the position taken by the Second Circuit." *Id.* at 1351 (citing *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962)). In *Goldlawr*, the Second Circuit explained the operation of Section 12 as follows:

> Section 12 of the Clayton Act . . . specifies where suit against a corporation under the antitrust laws may be brought, namely, in a district where it is an inhabitant and also where 'it may be found or transacts business.' Conversely, it should follow that if a corporation is not an inhabitant of, is not found in,

> and does not transact business in, the district, suit may not be so brought. By statutory grant if suit is brought as prescribed in this section 'all process in such cases may be served in the district of which it (the corporation) is an inhabitant, or wherever it may be found.' Thus, 'in such cases,' Congress has seen fit to enlarge the limits of the otherwise restricted territorial areas of process. *In other words, the extraterritorial service privilege is given only when the other requirements are satisfied.*

288 F.2d at 581 (emphasis added) (footnote and citations omitted).

This Court's decision in *Goldlawr* left the Second Circuit's interpretation of Section 12 intact. This Court reversed based on its rejection of the Second Circuit's entirely separate holding that the venue-transfer statute, 28 U.S.C. § 1406(a),[7] requires "the transferring court [to have] personal jurisdiction over the defendants." 369 U.S. at 465; *see also id.* at 466 ("The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not.").

The attempt by the *Go-Video* Court and other courts to brush aside the Second Circuit's interpretation of Section 12 in *Goldlawr* as "dictum," *e.g.*, *Go-Video*, 885 F.2d at 1411, is wholly unpersuasive. *Goldlawr* reached the issue upon which this Court reversed – whether the transferor court under § 1406(a) must have personal jurisdiction over the defendant – only because it had first held that plaintiff's failure to satisfy the special venue provision contained in Section 12's first clause prevented plaintiff from obtaining personal juris-

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[7] 28 U.S.C. § 1406(a) provides, as it did then: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

diction under Section 12's second clause. *See* 288 F.2d at 581. That latter holding – which directly conflicts with the holdings of the Third, Ninth and Eleventh Circuits – was necessary to the Second Circuit's decision in *Goldlawr* and remains intact to this day, as the District of Columbia Circuit has recognized. *See supra*, at 12-13.

In sum, the Second and District of Columbia Circuits have squarely held that antitrust plaintiffs may not use Section 12's special extraterritorial-service-of-process provision in lieu of the general state long-arm statute without also satisfying Section 12's special venue provision, which is part of the same sentence from which the service-of-process provision is taken, and to which it specifically refers.

3. The circuit split on the proper interpretation of Section 12 may actually be deeper than 3-2, given the closely related, albeit arguably distinguishable, holdings of the Fourth and Tenth Circuits in *Ballard v. Blue Shield of Southern West Virginia, Inc.*, 543 F.2d 1075 (4th Cir. 1976), and *Board of County Commissioners of the County of Chester v. Wilshire Oil Co. of Texas*, 523 F.2d 125 (10th Cir. 1975). In *Ballard*, the Fourth Circuit stated that "[a]lthough venue in antitrust actions is generally governed by 15 U.S.C. §§ 15, 22 – which allow suit in the district where the defendant resides, is found, has an agent, or transacts business – these statutes are not exclusive." 543 F.2d at 1080 (citing *Adams Dairy Co. v. National Dairy Products Corp.*, 293 F. Supp. 1135, 1140-41 (W.D. Mo. 1968)). The court then held that plaintiffs could resort to a general venue statute outside of the Clayton Act, namely 28 U.S.C. § 1392(a), which at the time provided that "'any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.'" 543 F.2d at 1080.

Similarly, in *Board of County Commissioners*, the Tenth Circuit held that "the general venue statute, § 1392(a), which allows an action against defendants residing in different districts in the same state to be brought in one of such districts even though one of the defendants did not reside there,"

"supplements 15 U.S.C. § 22 [Section 12 of the Clayton Act]." 523 F.3d at 127, 131.

However, the Fourth and Tenth Circuits' decisions in *Ballard* and *Board of County Commissioners* are arguably distinguishable and not as egregious as the aforementioned decisions of the Third, Ninth, and Eleventh Circuits. That is because they authorized an antitrust suit to go forward in one particular federal judicial district located in a State with multiple districts, provided all the defendants resided in that State. Thus, the breadth of permissible forum-shopping accorded antitrust plaintiffs is much more sharply circumscribed under these decisions, thereby limiting the hardship and unfairness, and the international comity implications, of haling out-of-district defendants into a federal district court in a State in which they reside.[8]

4. This split of authority has not gone unnoticed by other Circuits, and has produced academic commentary on both sides of the split. In *Sanderson v. Spectrum Labs, Inc.*, for example, the Seventh Circuit explicitly "recognize[d] that the circuits court are currently split with respect to the proper scope of the Clayton Act's nationwide service of process provision," and then drew a comparison between *GTE New*

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[8] The First Circuit has not squarely confronted the issue. In *Aro Manufacturing v. Automobile Body Research Corp.*, 352 F.2d 400 (1st Cir. 1965), that court first explained that "service of process is the vehicle by which the court may obtain [personal] jurisdiction," and then stated:

> The venue provision of the Clayton Act [Section 12], under which this suit is brought, also provides where process in such suit may be served. In suits under this statute, service on a foreign corporation is also valid if made in the manner prescribed by the law of the state in which service is made. Fed. R. Civ. P. 4(d)(7).

352 F.2d at 402-03 (footnote omitted). Because the court went on to hold that process had not been validly served under *any* available method, it had no occasion to reach the issue of which venue statute was available. 352 F.2d at 404.

Media Servs. and *Go-Video*. *Sanderson*, 2000 U.S. App. LEXIS 34058, at *8-*9 (7th Cir. Dec. 29, 2000) (unpub. order).

And in *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981) the Sixth Circuit noted the issue, but then stated that "[w]e need not decide this question because" the defendant "waive[d] any such objection here." 643 F.2d at 1238 n.3. *See also, e.g.*, *In re Magnetic Audiotape Antitrust Litigation*, 334 F.3d 204, 207 (2d Cir. 2003) (noting split); Jordan G. Lee, *Section 12 of the Clayton Act: When Can Worldwide Service of Process Allow Suit In Any District?* 56 FLA. L. REV. 673, 681-82 (2004) ("The treatment of the venue and worldwide service of process provisions of section 12 varies among the circuits, with some holding that section 12 broadly supplements the general venue and service of process requirements, but others holding that it narrowly supplants the general statutes"); *id.* at 688 ("It appears that federal circuits are evenly divided on the issue of which side of the section 12 debate to follow, creating confusion for potential litigants"); Von Kalinowski, 10 *Antitrust Laws and Trade Regulation*, § 1.06[4][a] at 1-104 (2d ed. 1999) ("A key question in international antitrust actions is whether personal jurisdiction may constitutionally be asserted over an alien person or entity."); *id.* at § 1.06[1] at 1-56 n.4.2 (citing, *inter alia*, *GTE New Media Servs*).

In his well-reasoned analysis predating *Go-Video* by several years, Professor Hovenkamp explained why "[i]t might be unfair to create a rule that would permit an alien whose only contacts with the United States are in New York to be haled before a federal court in California." Herbert Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis*, 67 IOWA L. REV. 485, 503 (1981-82) (footnote and citations omitted); *id.* at 504 ("Simply because a defendant is doing business *somewhere* in the United States, it should nevertheless not be answerable to suit *everywhere*.") (emphases in original).

Professor Hovenkamp explained more fully:

> The combination of the general venue statute and the aggregate [national] contacts doctrine could subject some defendants, particularly aliens, to unfair treatment. Under Clayton Act section 12 a plaintiff could obtain service on the defendant wherever it may be found and the aggregate contacts doctrine would enable the court to obtain personal jurisdiction over the defendant provided it had the requisite minimum contacts anyplace in the nation. For example, a European corporation doing business only in New York could be sued in California, and both venue and personal jurisdiction could be obtained.
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> A better approach is to interpret section 12 the way it is written. Worldwide service is proper only when the action is brought in the district where the defendant resides, is found, or transacts business. Thus, *the plaintiff who steps outside of section 12 to establish venue must also lose the benefit of section 12 for obtaining service of process. The plaintiff must then rely on the long-arm statute of the forum state.*

Id. at 509 (emphasis added) (footnotes and citations omitted).[9] Finally, Professor Hovenkamp noted that this Court in *Leroy v. Great Western United Corp.* "expressly rejected any

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[9] Professor Hovenkamp also observed:

> Other federal statutes that provide for worldwide service are limited by venue provisions that protect the defendant regarding choice of forum. For example, the Foreign Sovereign Immunities Act . . . also has its own special venue provisions. These provisions restrict venue to the judicial district in which "a substantial part of the events or omissions giving rise to the claim occurred," or where the defendant is licensed to do business or is doing business, or, in the case of foreign states themselves, in the District of Columbia. 28 U.S.C. § 1391(f) (1976).

Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts*, at 509 n.121.

interpretation intimating that under certain actions, in which the injuries might flow everywhere, the defendants could be answerable in every [judicial] district in the United States." Hovenkamp, at 516 (citing 443 U.S. 173, 184-85 (1979)).

5. The conflict of authority amongst the Circuits has also bred confusion and divergent outcomes amongst the district courts, leaving present and future litigants to guess at which of the competing interpretations of Section 12 will govern in their case, sometimes even in those Circuits comprising the aforementioned split.

In *General Electric Co. v. Bucyrus-Erie Co.*, for example, the Southern District of New York misconstrued *Goldlawr* "as requiring that *some* applicable venue statute must be met before section 12's service and personal jurisdiction clause may be invoked." 550 F. Supp. 1037, 1042 (S.D.N.Y. 1982) (emphasis in original); *but see supra*, at 14-15. Having brushed aside binding Circuit precedent, the court then offered the following dubious grammatical rationale that even the Ninth Circuit in *Go-Video* shied away from endorsing, *see Go-Video*, 885 F.2d at 1412:

> The word "such" means "the aforementioned," *Webster's Third International Dictionary* (unabr. ed. 1963). Thus, when "such" precedes a noun it is assumed to refer to a particular antecedent noun and any dependent adjective or adjectival clauses modifying that noun, but not to any other part of the preceding clause or sentence. Applying this rule to section 12, "in such cases" would refer to "any suit, action, or proceeding under the antitrust laws against a corporation," and not to anything else in section 12's first clause.

550 F. Supp. at 1042 n.7.[10]

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[10] The court offered no support – nor does there appear to be any – for its critical premise that "when 'such' precedes a noun it is assumed to refer to a particular antecedent noun and any dependent

Other district courts have similarly misconstrued Section 12, although most have not done so based upon the foregoing grammatical rationale. *See, e.g.*, *United Phosphorus, Ltd. v. Angus Chem. Co.*, 43 F. Supp. 2d 904, 911 (N.D. Ill. 1999); *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 982 F. Supp. 1138, 1145 n.12 (E.D. Va. 1997); *Paper Sys. Inc. v. Mitsubishi Corp.*, 967 F. Supp. 364, 366-67 (E.D. Wisc. 1997); *Daniel v. American Bd. of Emergency Medicine*, 988 F. Supp. 127, 144 (W.D.N.Y. 1996) (but recognizing that its interpretation of Section 12 would render the first clause thereof superfluous); *Icon Indus. Controls Corp. v. Cimetrix, Inc.*, 921 F. Supp. 375, 376 (W.D. La. 1996) ("this action literally may be brought in *any* judicial district") (emphasis added); *Miller Pipeline Corp. v. British Gas*, 901 F. Supp. 1416, 1420 (S.D. Ind. 1995); *Kingsepp v. Wesleyan Univ.*, 763 F. Supp. 22, 24 (S.D.N.Y. 1991); *In re Plastic Bag Production Patent and Antitrust Litigation*, 1987 U.S. Dist. LEXIS 3881, at *5-*6 (D. Mass. Apr. 24, 1987); *Amtrol, Inc. v. Vent-Rite Valve Corp.*, 1986 U.S. Dist. LEXIS 25340, at *20 (D. Mass. May 19, 1986); *King v. Johnson*

[Footnote continued from previous page]

adjective or adjectival clauses modifying that noun, but not to any other part of the preceding clause or sentence."

This fallacy appears to rest on the unstated assumption that the word "such" as used in Section 12's second clause either functions as a pronoun, or should be treated as having the same attributes that the word "such" may have when it functions as a pronoun. However, the word "such" as used in Section 12's second clause functions as an adjective modifying the noun "cases" ("in *such* cases"), and there is nothing that prevents the phrase "in such cases" from referring to the category of cases described in the first clause of the sentence at issue.

Indeed, as the District of Columbia Circuit has explained, "in such cases," most naturally read in the context of the sentence of which it is a part, clearly refers to all antitrust suits against a corporation in a judicial district inhabited by the corporation, or in which the corporation may be found or transacts business. *GTE New Media Servs.*, 199 F.3d at 1351.

Wax Associates, Inc., 565 F. Supp. 711, 719 n.11 (D. Md. 1983); *Scriptomatic, Inc. v. Agfa-Gevaert, Inc.*, 1973 WL 830, at *2 (S.D.N.Y. Jun. 28, 1973); *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70, 84 (S.D.N.Y. 1965).

A countervailing body of precedent has developed, however, in other district courts that have hewed more closely to their own binding Circuit authority and to a construction of Section 12 that does not render the first clause thereof superfluous. In *Management Insights, Inc. v. CIC Enterprises, Inc.*, for example, the Northern District of Texas reasoned as follows, after "recogniz[ing] that a circuit split exists":

> [T]he Ninth Circuit's reading of section 12, which allows a national contacts personal jurisdiction analysis if venue is proper under section 12 or § 1391, coupled with § 1391(c)'s provision that venue is proper for corporate defendants as long as personal jurisdiction exists in a particular district, requires a court's inquiry into venue and jurisdiction in antitrust cases to become indisputably circular and monolithic. Section 1391(c) coalesces with the service of process portion of section 12 to ask the unified question: Has the corporate defendant had the requisite minimum contacts with the United States? If the defendant is a domestic corporation, the Ninth Circuit's approach, in conjunction with § 1391(c), allows a plaintiff to sue a defendant *in any district*, even if that district has absolutely no relation to the defendant's business or to the incident that prompted the suit. For instance, a Texas plaintiff could hale an Alaskan corporate defendant into its courts even though the defendant has had no dealings at all with the forum state. The *Go-Video* Court pointed to no legislative history that supports such a broad reading of section 12, and this Court finds that such an interpretation is indeed contrary to the plain meaning of the statute.

194 F. Supp. 2d 520, 532 (N.D. Tex. 2001) (footnote and citations omitted).

Several other district courts have joined in this more textually sound interpretation of Section 12, which has the advantage of not rendering the first half of Section 12 wholly superfluous. *See, e.g., Yellow Page Solutions, Inc. v. Bell Atlantic Yellow Pages Co.*, 2001 WL 1468168, at *3 (S.D.N.Y. Nov. 19, 2001) (following *Goldlawr* and *GTE New Media Servs.*); *Sea-Roy Corp. v. Parts R Parts, Inc.*, 1996 U.S. Dist. LEXIS 13565, at *18 (M.D.N.C. Jul. 30, 1996); *Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 709 F. Supp. 1279, 1286-87 (S.D.N.Y. 1989) (following *Goldlawr*); *Reynolds Metal Co. v. Columbia Gas Sys., Inc.*, 694 F. Supp. 1248, 1250 (E.D. Va. 1988); *Grosser v. Commodity Exch., Inc.*, 639 F. Supp. 1293, 1315 (S.D.N.Y. 1986) ("because venue as to MACE does not lie in this district, personal jurisdiction cannot be asserted over it by means of the nationwide service of process provision of Section 12").

The current divide of authority amongst the district courts, tracking the earlier-described circuit split, will only deepen absent authoritative guidance by this Court.

B. The Circuit Split Regarding The Correct Interpretation Of Section 12 Of The Clayton Act Raises Significant Constitutional and International Comity Concerns

Allowing the tortured interpretation of Section 12 by the Third, Ninth, and Eleventh Circuits to remain uncorrected will not only breed further confusion amongst litigants, but will give rise to significant constitutional and international comity concerns that can be avoided by construing the statute as it is written.

1. Conditioning the use of Section 12's worldwide-service-of-process provision on satisfying Section 12's venue provision avoids a difficult constitutional issue that this Court has declined to reach at least twice in recent years. In *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, a plurality of this Court noted:

> We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits. See *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 293-295 (CA3 1985); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 283 (CA3 1981); see also Born, Reflections on Judicial Jurisdiction in International Cases, to be published in 17 Ga. J. Int'l & Comp. L. 1 (1987); Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 127-145 (1983).

480 U.S. 102, 113 n.* (1987) (plurality op.); *see also Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 102-03, n.5 (1987) (citations omitted); *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d at 299 n.15 ("We note, as did the *Go-Video* court, that the Supreme Court has on two occasions explicitly declined to decide the constitutionality of national contacts analysis.") The uncertainty regarding whether Section 12 allows a foreign corporation to be sued in any judicial district of the United States, based only on the corporation's aggregate contacts with the United States as a whole, presents another, related basis for granting review by this Court. Not only is there a conflict of authority in the lower courts about the constitutionality of aggregate "national contacts" analysis, but the position taken by several of those courts upholding such analysis appears to be in tension with this Court's precedents.

As Judge Garza has explained:

> Because the personal jurisdiction requirement is a function of the individual liberty interest, the proper focus for a personal jurisdiction test should be on protecting an individual's liberty interest in avoiding the burdens of litigating in a distant or inconvenient

> forum. Requiring that the individual defendant in a national service of process case only reside somewhere in the United States does not protect this interest. Consequently, I believe that the majority errs when it concludes that the proper personal jurisdiction test in a national service of process case is whether minimum contacts exist between the individual defendant and the national sovereign.

Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1259 (5th Cir. 1994) (Garza, J., dissenting); *see also Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947 n.23 (11th Cir. 1997) ("At this point, we depart from the reasoning and holdings of the majority of our sister circuits [upholding aggregate 'national contacts' analysis]."); *id.* at 945 n.18 ("'The better view . . . would require that the national contacts test be supplemented by some assurances that the particular choice of forum will be one that is fair to the defendant.'") (quoting Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 1067.1, at 325 (1987)); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1389 n.2 (8th Cir. 1991) ("The fifth amendment is 'essentially a recognition of the principles of justice and fundamental fairness,' . . . so it is appropriate that we examine the contacts *with the forum state*.") (emphasis added) (citations omitted).

Such an interpretation seems most consistent with the theoretical basis articulated by this Court for imposing due process limits on the exercise of personal jurisdiction over non-resident defendants. As this Court explained in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*:

> The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of indi-

> vidual liberty. Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), *quoting Milliken v. Meyer*, 311 U.S. 458, 463 (1940).
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> . . .
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> [T]he Due Process Clause . . . is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

456 U.S. 694, 702-03 & n.10 (1982) (footnote omitted); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 & n.13 (1985); *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 203 n.4 (D.C. Cir. 1981) (R.B. Ginsburg, J.) ("As to federal court jurisdiction, particularly in litigation involving federal claims, . . . the fairness-to-defendant consideration[] remains vital").

Courts that have approved of aggregate "national contacts" analysis have more often than not simply assumed away a critical part of the constitutional question: namely, whether the relevant forum against which to test a defendant's contacts is the United States as a whole, or the particular judicial district in which the district court sits (*e.g.*, the District of Maine). And they have done so on a basis that is not true to this Court's teaching in *Bauxites* and *Burger King*: namely, that the individual, rather than the sovereign, is the relevant focus for analyzing due process limits on personal jurisdiction. *See, e.g.*, *Federal Trade Comm'n v. Jim Walter Corp.*, 651 F.2d 251, 256 (5th Cir. Unit A 1981) ("Because the district court's jurisdiction is always potentially . . . co-

extensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States, 'the sovereign that has created the court'") (citations omitted); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974).

2. The approach that allows a foreign corporation to be sued in any judicial district of the United States, regardless of whether that corporation has any contacts with that district or with the State in which that district court sits, also raises significant international comity concerns. This approach threatens to subject many more foreign corporations to suit in American courts under United States antitrust law and, pursuant to the doctrine of "pendent personal jurisdiction," under any state laws giving rise to factually related claims. *E.g., Action Embroidery*, 368 F.3d 1174, 1180.[11] Yet this Court observed just last Term in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." No. 03-724, slip op. at 7 (U.S. Jun. 14, 2004).

Moreover, the approach adopted by the Third, Ninth, and Eleventh Circuits, and the District Court here, gives plaintiffs free rein to subject foreign corporations to suit *anywhere* in the United States, no matter how unfair or inconvenient that location is to the foreign defendant, or how

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[11] This risk is illustrated in the instant case. At least four States have dismissed Daimler Canada or Mercedes Canada from state cases paralleling the instant case: *Maxwell v. General Motors Corp., et al.*, No. CV 2003-003925 (Sup. Ct. Maricopa Co. Ariz., May 6, 2004), *Lerfeld v. General Motors Corp., et al.*, No. CT03-003327 (Hennepin Co. Dist. Ct. Minn., Nov. 14, 2003), *Paltre v. General Motors Corp.*, Index No. 005014/2003 (Sup. Ct. Nassau Co. New York, Apr. 21, 2004), and *Wilson v. General Motors Corp., et al.*, No. L-1287-03 (Super. Ct. Camden Co. New Jersey, Oct. 3, 2003). Yet Judge Hornby has asserted supplemental jurisdiction over identical claims based on the law of these States that were also filed in the federal proceeding, and has indicated that he will not be bound by the determinations of lack of jurisdiction by those state courts.

unrelated that district is to whatever contacts the foreign defendant may have with some other part of the United States.

Such an outcome does not differ all that much from the outcome that this Court categorically rejected last Term in *Empagran*: a situation in which, "'[e]ffectively, the United States courts would provide *worldwide subject matter jurisdiction*" to antitrust plaintiffs wishing to sue foreign corporations having some tangential relation to the United States as a whole. Slip op. at 10 (emphasis added) (quoting P. Areeda & H. Hovenkamp, Antitrust Law ¶ 273, pp. 51-52 (Supp. 2003)); *see also id.* at 11 (citing the concerns expressed in the amicus briefs filed by Canada, Japan, and the Federal Republic of Germany).

Several Terms ago, this Court emphasized that "'[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field,'" and that courts should be mindful of "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system." *Asahi*, 480 U.S. at 114-15 (citations omitted).

II. THERE IS NO REASON TO DEFER REVIEW OF THE PURE QUESTION OF LAW PRESENTED IN THIS PETITION UNTIL THE ENTRY OF FINAL JUDGMENT IN THIS CASE

This Court should not wait until the entry of final judgment in this case to resolve the pure question of law presented in this Petition, on which the Circuits are split, and which the District Court certified for interlocutory appeal. The First Circuit's refusal to rule upon the scope and interrelationship of Section 12's personal jurisdiction and venue provisions departs from the established practice of nearly every other Circuit that has addressed this issue. Every other Circuit has done so either on interlocutory appeal, or on direct appeal following the district court's dismissal of the lawsuit for lack of personal jurisdiction. *See In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 290 (3d Cir. 2004) (interlocutory appeal); *GTE New Media Servs.*

Inc. v. Bellsouth Corp., 199 F.3d 1343, 1345 (D.C. Cir. 2000) (same); *Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1407 (9th Cir. 1989) (same); *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 580 (2d Cir. 1961) (same), *rev'd on other grounds*, 369 U.S. 463 (1962); *see also Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1176 (9th Cir. 2004) (on appeal of district court's dismissal of lawsuit); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir. 1988) (same); *Aro Manufacturing Co., Inc. v. Automobile Body Research Corp.*, 352 F.2d 400, 402 (1st Cir. 1965) (same).

This is hardly surprising, given that the whole point of the defense of lack of personal jurisdiction is to protect nonresidents from the burden of having to defend suit in the foreign forum. As one Court of Appeals has explained:

> As a general rule, courts should address issues relating to personal jurisdiction before reaching the merits of a plaintiff's claims. *See Madara v. Hall*, 916 F.2d 1510, 1513-14 & n.1 (11th Cir. 1990); Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, Civil 2d § 1351, at 243-44 (1990). A defendant that is not subject to the jurisdiction of the court cannot be bound by its rulings. *Madara*, 916 F.2d at 1514. Thus, as a preliminary matter, courts should determine if they have the power to bind a defendant with a ruling on the merits of the case.

Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 940 (11th Cir. 1997); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980) ("The concept of minimum contacts . . . protects the defendant against the burdens of litigating in a distant or inconvenient forum."). That is also presumably why a defense of lack of personal jurisdiction is waived unless raised in a motion to dismiss or a responsive pleading at the outset of a lawsuit. *See* Fed. R. Civ. P. 12(h)(1).

It would be wholly incongruous to require Petitioners to endure a costly trial and related proceedings in this multi-

million-dollar lawsuit, and to overcome the pressure to settle such a high-stakes lawsuit in the interim, before their defense of lack of personal jurisdiction can be vindicated. Such a requirement would inflict upon Petitioners the very damage and injury against which the defense of lack of personal jurisdiction was designed to protect.

Finally, even if Petitioners again raised this issue of law for review on direct appeal following the entry of final judgment in this case, it is far from clear that there would be any further factual or legal development of the statutory interpretation issues presented in this petition. As the District Court noted in its certification order, resolving this pure question of law now will "materially advance" "the ultimate termination of th[is] complex multidistrict litigation" "as to these two Canadian parties [Petitioners], because if they are successful on their appeal of this issue, the litigation will terminate as to them." Pet. App. 27a.

CONCLUSION

A deep and clear circuit split exists on a question of statutory interpretation that, if left unresolved, threatens to raise serious constitutional, commercial, and international comity concerns. This Court should therefore grant the instant petition for a writ of certiorari.

Respectfully submitted.

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November 30, 2004

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 04-8006

IN RE: NEW MOTOR VEHICLES
CANADIAN EXPORT ANTITRUST LITIGATION

GEORGE JAYNES, ET AL.,
Plaintiffs, Respondents,

v.

DAIMLERCHRYSLER CANADA INC., ET AL.,
Defendants, Petitioners.

Before
Torruella, Selya and Howard, Circuit Judges.

JUDGMENT
Entered: August 3, 2004

We decline, in the exercise of our discretion, to accept this issue for interlocutory appeal under 28 U.S.C. § 1292(b).

By the Court:

Richard Cushing Donovan, Clerk.

By: /s/ Julie Gregg
Appeals Attorney

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE NEW MOTOR VEHICLES CANADIAN EXPORT ANTITRUST LITIGATION	]]]]	MDL Docket No. 1532

MEMORANDUM DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

In this opinion I conclude that section 12 of the Clayton Act permits worldwide service of process upon alien corporate defendants in antitrust cases, and that the Fifth Amendment measures the constitutional adequacy of contacts by such defendants according to their contacts with the United States as a whole.

I. SUMMARY

New motor vehicle purchasers and lessees claim that American and Canadian car manufacturers, distributors, dealers (although not named as defendants) and dealer associations conspired to prevent a discount distribution channel from operating in the United States-specifically, that cheaper Canadian versions of various models were prohibited entry into the American market. They maintain that the conspiracy violated section 1 of the Sherman Act, 15 U.S.C. § 1 (1997),

and that the resulting lack of competition kept American retail prices excessively high. They seek class-wide damages[1] and injunctive relief under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1997). The Multi-District Panel has transferred 26 such cases to this District for pretrial management. Parallel cases are pending in a number of state courts.

Certain Canadian defendants-Toyota Canada, Inc. ("Toyota Canada"); DaimlerChrysler Canada, Inc. ("Daimler Canada"); Mercedes-Benz Canada, Inc. ("Mercedes-Benz Canada"); Nissan Canada, Inc. ("Nissan Canada"); BMW Canada, Inc. ("BMW Canada"); and the Canadian Automobile Dealers Association ("CADA") - move to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2).

After oral argument on January 5, 2004, it is my understanding that (1) the plaintiffs' Amended Consolidated Class Action Complaint supercedes *all* previous complaints in these consolidated actions; (2) no defendants now seek dismissal for improper service of process; (3) the plaintiffs do not assert jurisdiction based on any state long-arm statute; and (4) the plaintiffs do not attempt to meet the First Circuit's requirement for asserting personal jurisdiction under Fed. R. Civ. P. 4(k)(2). *See United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 41-42 (1st Cir. 1999) .

I **DENY** the 12(b)(2) motions of Daimler Canada and CADA. I **GRANT** the 12(b)(2) motions of Nissan Canada, BMW Canada and Toyota Canada. I **DEFER** action on the motion of Mercedes-Benz Canada, while permitting jurisdictional discovery concerning Mercedes-Benz non-export arrangements.

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[1] The request for class certification is not yet ripe.

II. ANALYSIS

(A) Section 12 of the Clayton Act

Section 12 of the Clayton Act provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22 (1997).

The cases are unanimous that this single sentence has two topics. The clause before the semi-colon is a venue provision (describing districts where an antitrust lawsuit against a corporate defendant may be heard). *See United States v. Scophony Corp.*, 333 U.S. 795, 802 (1948); *GTE New Medical Servs. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000); *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 U.S. App. LEXIS 2432, *11 (3d Cir.). The clause following the semi-colon is a jurisdiction/service of process provision (describing where a corporate defendant may be served with papers that bring it before a particular court). *See id.* The cases also agree that the second clause's final phrase, "wherever it may be found," permits worldwide service of process upon a corporate defendant if that corporate defendant is subject to section 12's language. *See Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1413 (9th Cir. 1989); *Auto. Refinishing Paint*, 2004 U.S. App. LEXIS 2432, at * 11; *Amtrol, Inc. v. Vent-Rite Valve Corp.*, 646 F. Supp. 1168, 1171 (D. Mass. 1986).

But courts have struggled for years with the meaning of the second clause's limiting phrase "in such cases."[2] Does "such cases" mean antitrust lawsuits against a corporate defendant? Or does it mean only antitrust cases against a corporate defendant that meet all the criteria of the first clause, *i.e.*, where venue is established on the criteria set out there? The question is important because there is a separate venue statute that is broader for alien defendants, permitting venue over alien defendants in any district. *See* 28 U.S.C. § 1391(d). If plaintiffs can use the alien venue statute in combination with section 12's service of process provision, they can sue an alien corporate defendant in federal court anywhere in the United States, subject to constitutional limitations, and serve that defendant anywhere in the world. But if section 12's worldwide service provisions are limited to cases where venue exists under section 12's first clause, plaintiffs will be far more limited in their choice of forum.

The parties agree that in this multi-district case I must apply First Circuit law to determine the answer. Unfortunately, the First Circuit has not spoken on the issue. Until last month, there was an even split of the other Circuits, the Ninth Circuit choosing the first (broader) interpretation and the D.C. Circuit choosing the second (narrower).[3] *Compare*

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[2] *See, e.g., Auto. Refinishing Paint*, 2004 U.S. App. LEXIS 2432, at *12; *GTE*, 199 F.3d at 1351; *Go-Video*, 885 F.2d at 1408; *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961); *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037, 1041-42 (S.D.N.Y. 1982).

[3] It is unclear how the Second Circuit currently views section 12 of the Clayton Act. *Compare Goldlawr*, 288 F.2d at 581 ("[I]f a corporation is not an inhabitant of, is not found in, and does not transact business in, the district, suit may not be so brought. . . .

[Footnote continued on next page]

Go-Video, 885 F.2d at 1413 *with GTE*, 199 F.3d at 1351. Part of the delay in issuing this opinion reflected my own effort to write an opinion dealing with the ambiguous language of the statute, the circuit and district cases, the legislative history, and Supreme Court pronouncements about venue generally and about the section 12 language in particular. But now the Third Circuit has written a comprehensive opinion surveying the authorities, *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 U.S. App. LEXIS 2432. I see no reason as a trial court judge to repeat what it has done. Its reasoning is persuasive. I believe the First Circuit will follow it, if presented with the issue. I therefore follow the Third Circuit (and the Ninth Circuit), concluding that the second, worldwide service, clause of section 12 is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with the alien venue statute.

(B) Nationwide Contacts

Finding that the statutes permit personal jurisdiction is the first step in the analysis. But there is a second step: the exercise of jurisdiction must also meet constitutional requirements. Because the personal jurisdiction asserted here derives from federal statutes, I do not apply the traditional Fourteenth Amendment due process analysis that deals with the power of the individual states. Instead, the constitutional

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[Footnote continued from previous page]

[T]he extraterritorial service privilege is given only when the other requirements are satisfied."), *with Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 & n.10 (2d Cir. 1972) (liberally construing the same phrase in the Securities Exchange Act as referring only to service of process and having nothing to do with venue, and noting that the "ineptly worded provision" was modeled after section 12 of the Clayton Act).

inquiry arises under the Fifth Amendment (dealing with the federal government) and the analysis is whether a particular defendant has sufficient contacts with the United States as a whole to justify the assertion of federal court jurisdiction over it. The Supreme Court has not spoken to this issue, but that is the teaching of First Circuit caselaw. In *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001), the court stated:

> The personal jurisdiction inquiry in federal question cases like this one differs from the inquiry in diversity cases. Here, "the constitutional limits of the court's personal jurisdiction are fixed ... not by the fourteenth Amendment but by the Due Process Clause of the Fifth Amendment." This distinction matters because under the Fifth Amendment, a plaintiff need only show that the defendant has adequate contacts with the United States as a whole, rather than with a particular state.

(internal citations omitted); *accord United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992). Here, the plaintiffs assert both general and specific jurisdiction. I analyze the showing they have made under the *prima facie* standard of *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671,675 (1st Cir. 1992). Thus I "consider only whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." *Id.* I consider both "general" jurisdiction (jurisdiction asserted in connection with suits not directly founded on forum-based conduct) and "specific" jurisdiction (jurisdiction asserted when a suit arises directly out of forum-based activities). *See Donatelli v. National Hockey League*, 893 F.2d 459, 462-63 (1st Cir. 1990) (citations omitted). Because there is no Supreme Court caselaw on the Fifth Amendment issue, I use the factors identi-

fied in its Fourteenth Amendment jurisdictional cases, as they apply to nationwide contacts.

(1) General Jurisdiction

Assertion of general jurisdiction over a defendant requires a court to examine a defendant's contacts with the forum "to determine whether they constitute the kind of continuous and systematic general business contacts" that will satisfy constitutional standards. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). If sufficient contacts do exist, the exercise of jurisdiction must also be reasonable. *Swiss Am. Bank*, 274 F.3d at 619 (citing *Donatelli*, 893 F.2d at 465). But if such contacts do not exist in sufficient abundance, the general jurisdiction inquiry ends. *Donatelli*, 893 F.2d at 465. The constitutional parameters of general jurisdiction require the contacts to be "continuous" and "substantial" (single or isolated activities are insufficient), and at a level "that a party who enjoys the benefits of conducting business in a particular forum should be willing to bear the correlative burden of submitting to the forum's courts." *Id.* at 463 (citing *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 317-19 (1945)). The Supreme Court has said that these principles are designed to permit people or entities to structure their conduct in such a manner as to gain some assurance that their conduct will not render them liable to suit in a particular jurisdiction. *See Burger King v. Rudzewicz*, 471 U.S. 461, 472 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

In this case, the plaintiffs allege general factors in support of general jurisdiction: the defendants benefited from international agreements designed for the automotive industry such as NAFTA and Auto Pact; substantial automotive trade goes on between the United States and Canada; and complex corporate structures camouflage the reality of United States trade. Pls.' Mem. in Opp'n at 3-7 (Docket Item #74). These contextual allegations are insufficient to

support general personal jurisdiction. A particular defendant *itself* must create the connection with the forum. *See Asahi Metal Indus. Co., Ltd. v. Super Ct. of California, Solano County*, 480 U.S. 102, 109 (1987) (citing *Burger King*, 471 U.S. at 475).

The plaintiffs also point to various defendant activities as continuous and systematic contacts with the United States sufficient to support general jurisdiction: using United States-based advertising services; officers attending meetings and training in the United States; purchasing parts and vehicles from the United States; manufacturing and selling vehicles in Canada that ultimately end up in the United States market; and being party to American lawsuits. PIs.' Mem. in Opp'n at 7-13. I conclude that separately and collectively these factors and activities do not meet the constitutional threshold for general jurisdiction over the Canadian defendants.

First, taking advantage of American advertising services, attending general meetings in the United States or purchasing vehicle parts from the United States unrelated to the underlying cause of action, without more, will not support general jurisdiction. *See, e.g., Helicopteros*, 466 U.S. at 416, 418 (purchases of helicopters, equipment and training services, even if occurring at regular intervals, accepting into a bank account checks drawn on a bank located in the forum and sending personnel and officers to the forum for training and contract negotiation sessions are not sufficient to warrant personal jurisdiction over a nonresident defendant corporation in a cause of action not related to those activities); *Swiss Am. Bank*, 274 F.3d at 619-20 (citing *United States v. Swiss Am. Bank, Ltd.*, 116 F. Supp.2d 217, 221-22 (D. Mass. 2000)) (foreign bank's advertising in an American magazine, subscribing to an American credit card company, entering into a licensing agreement with an American company, being an appellant to a lawsuit in an American court, having relationships and accounts with American banks and entering

into contracts, joint ventures and loan agreements with American companies are insufficient contacts to meet the standards of general jurisdiction); *Noonan v. Winston Co.*, 135 F.3d 85, 92-93 (lst Cir. 1998) (general jurisdiction did not exist where foreign company solicited business in the forum, and visited the forum to establish business relationships and negotiate orders); *Cascade Steel Rolling Mills v. C. Itoh & Co.*, 499 F. Supp. 829, 841 (D. Or. 1980) (denying jurisdiction over Japanese steel company whose employees made isolated visits to the U.S. on matters unrelated to the antitrust claim); *accord* Philip E. Areeda & Hebert Hovenkamp, IA *Antitrust Law* ¶ 271c, c2, at 340, 342 (2d ed. 2000) (citations omitted) (a few meetings, isolated visits, attendance at trade association meetings (at least when not related to the litigation's subject matter), sponsorship of national advertising, and purchase of American parts by a foreign corporation are insufficient contacts for personal jurisdiction).

Second, the manufacturing of vehicles in Canada destined for eventual distribution in the United States (through intermediate sales) does not add enough to sustain general jurisdiction: the defendants' manufacturing operations are not within the forum.

Finally, being a party to an American lawsuit unrelated to this lawsuit cannot be considered a continuous or systematic activity. *See Donatelli*, 893 F.2d at 463 (citations omitted) (single isolated activities insufficient); *Swiss Am. Bank*, 274 F.3d at 619 (even in combination with other contacts, being an appellant in a lawsuit in an American court insufficient to assert jurisdiction).

Because all the Canadian defendants lack the continuous and substantial contacts with the forum necessary to assert general jurisdiction, I turn to specific jurisdiction.

(2) Specific Jurisdiction

In order to sustain specific jurisdiction over these Canadian defendants, the plaintiffs must show first that (1) the defendants in question purposefully directed activities towards residents of the forum (here, the United States as a whole), and (2) the litigation results from injuries that arise out of or relate to those activities. *Burger King Corp.*, 471 U.S. at 472 (internal quotations and citations omitted) (14th amendment case). Second, these contacts must constitute "purposeful availment" of the benefits and protections afforded by the forum's laws. *Swiss Am. Bank*, 274 F.3d at 621. The cornerstones of purposeful availment are voluntariness and foreseeability of being haled into the forum's courts. *Sawtelle v. Farrell*, 70 F.3d 1381, 1391 (1st Cir. 1995) (citing *Ticketmaster-New York v. Alioto*, 26 F.3d 201, 207 (1st Cir. 1994)). *See also Burger King*, 471 U.S. at 475 (jurisdiction may not rest on the "unilateral activity of another party or third person"); *World-Wide Volkswagen*, 444 U.S. at 297 (for a court to assert jurisdiction, a defendant's conduct and connection with the forum must be such that it should reasonably anticipate being haled into court there).

Third, even where such contacts exist, I must examine reasonableness. I must consider: (1) the defendant's burden of appearing; (2) the forum's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the judicial system's interest in obtaining the most effective resolution of the controversy; and (5) the common interests of all sovereigns in promoting substantive social policies. *See Asahi*, 480 U.S. at 113-116 (citing *World-Wide Volkswagen*, 444 U.S. at 292). In addition, special concerns arise when dealing with foreign defendants who may face unique and serious burdens litigating in a foreign legal system. *Id.* at 113-116.

(a) CADA

The Canadian Automobile Dealers Association ("CADA") is a not-for-profit organization that represents, promotes and protects the interests of franchised automobile dealers in Canada. Gauthier Decl. ¶¶ 1-4 (Docket Item #67). CADA does not sell or lease vehicles in the United States or Canada. *Id.* ¶ 7. The consumers allege that CADA issued an August 2002 report that describes a meeting with NADA where a "multi-faceted strategy was discussed" and "a consensus to work together" was reached to prevent new motor vehicle exports from Canada to the United States. Amended Compl. ¶ 68. The consumers assert that this CADA report claims that American and Canadian dealers and NADA "will cooperate wherever possible in assisting CADA with initiatives addressing export sales," and that representatives of the manufacturing defendants are pursuing "a united campaign against the unauthorized exporting of new vehicles into the U.S.A." *Id.* ¶¶ 69,71. Thus, the plaintiffs maintain that in its representative role, CADA supported certain activities and strategies designed to limit American consumers' ability to purchase or lease exported Canadian motor vehicles.[4] *See* Maier Aff., Exs. 10, 11; Gauthier Decl. ¶ 6.

The specific contact with the forum is CADA's attendance at a New York meeting in March 2002. CADA met with the National Automobile Dealers Association ("NADA") (representing American dealers) in New York on that date to discuss the "[e]xport sales issue," which it called "an issue of great concern to both associations." Maier Aff., Ex. 10 at 2; Gauthier Decl. ¶ 6. CADA documented its attendance and the topic of the meeting in both a newsletter

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[4] The industry refers to these export sales as "Grey Market Sales." *See* Maier Aff., Ex. 10 (Docket Item #75).

and memorandum.[5] Maier Aff., Exs. 10, 11. CADA made this contact voluntarily and deliberately, not through a third party. CADA "deliberately 'reach[ed] out beyond' [Canada] and negotiated with [an American] corporation. . . ." Burger King, 471 U.S. at 479. Although it was a single meeting in the United States on this topic, the plaintiffs allege that CADA participated in the conspiracy to withhold Canadian vehicles from the American market through precisely this type of informational meeting, *see* Amended Compl. ¶ 5, and that at this New York meeting CADA "made it clear to the NADA representatives that CADA would in no way support known exporters. . . ." Maier Aff., CADA Newsletter, Ex. 10 at 2. Accepting this evidence as true solely for the purposes of jurisdictional analysis, one can infer CADA's statement to be an *agreement* made in New York to help withhold Canadian vehicles from the American market. That is sufficient to make a *prima facie* showing of personal jurisdiction. This was significant activity in the United States that related to this litigation. This litigation results from alleged injuries that "arise out of or relate to" this activity. "[P]arties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state'" are subject to jurisdiction. *See Burger King*, 471 U.S. at 473. Under *Burger King*, when contact with the forum is related to the cause of action, as here, jurisdiction is more readily granted. Areeda & Hovenkamp, IA *Antitrust Law* ¶ 271c, at 340 (citing *Burger King*).

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[5] On January 16, 2002, a CADA representative also attended a meeting with the Resource Dealers Group in Chicago regarding Canadian automobile warranties. Gauthier Decl. ¶ 6. The plaintiffs, however, have not proffered any evidence that the meeting's topic was grey market warranties in general or, specifically, the refusal to honor Canadian warranties in the United States.

In assessing the reasonableness factors (called the gestalt factors in the First Circuit, *Sawtelle*, 70 F.2d at 1394), I conclude that the extent of the burden on CADA to litigate in the United States falls short of reaching constitutional significance. Although defending in a foreign jurisdiction always presents some measure of inconvenience, *accord id.* at 1395 (citing *Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994)), CADA regularly participates in meetings, conventions and symposiums in the United States. *See* Gauthier Decl. ¶ 6. American courts clearly have an interest in adjudicating the antitrust injury that the plaintiffs allege, and the plaintiffs should be afforded deference in choosing to press their claims in American courts, *see Sawtelle*, 70 F.3d at 1395 (citations omitted). The United States has attempted to provide a convenient forum for its residents to redress injuries of the foreign defendants. The Multi-District Panel chose to transfer these cases to Maine because I have the time and experience to oversee this litigation, and because Maine is a convenient forum due to its proximity to Canada. Transfer Order at 2 (Docket Item # 1). The interest of the judicial system in the effective administration of justice does not appear to cut in either direction here. *See Ticketmaster*, 26 F.3d at 211. One substantive social policy to consider, *see Asahi*, 480 U.S. at 115, might be the appropriateness of application of American antitrust laws to foreign corporations, but that issue has not been raised by the parties in discussion of the jurisdictional calculus.

After considering the relatedness of CADA's activities for the underlying claim, the deliberateness of its conduct and the reasonableness of the exercise of jurisdiction, I **DENY** CADA's motion to dismiss for lack of personal jurisdiction.

(b) Canadian Manufacturers/Distributors

The manufacture, distribution and sale of a particular brand of motor vehicles on a worldwide basis typically involve many corporate entities. The plaintiffs assert that the

enterprise is nevertheless integrated in each brand and that a court should not be diverted in the personal jurisdiction analysis by limiting itself to the contacts of a singular corporate defendant.[6] They point to websites where various de-

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[6] Despite the economic realities, I do not treat the corporate activities of the intricate corporate structures present in this case as unified action by parents and subsidiaries. I also do not uphold general jurisdiction on this basis over any Canadian defendant, each of them a corporate subsidiary, because a subsidiary does not achieve continuous and systematic contacts with the United States solely by having a parent company located in the United States. *See Saraceno v. S.C. Johnson and Son, Inc.*, 83 F.R.D. 65, 67 (S.D.N.Y. 1979) (citing *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925)); *Henry v. Offshore Drilling (W.A.) Pty., Ltd.*, 311 F. Supp. 340, 342 (E.D. La. 1971). However, I am troubled by the fact that the corporate websites of these automobile manufacturers and distributors go out of their way to describe the global nature and interconnectedness of the various subsidiaries, *see* n. 7, *infra*. Unwittingly, they make a strong case for the recent conclusions by some commentators and courts, that continuing to observe the corporate forms for personal jurisdiction purposes is blinking today's economic reality. *See, e.g., In re Tamoxifen Citrate Antitrust Litig.*, 262 F. Supp. 2d 17, 22-23 (E.D.N.Y. 2003) (citing *Waldron v. British Petroleum Co., Ltd.*, 149 F. Supp. 830, 834-35 (S.D.N.Y. 1957)); Lea Brilmayer and Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Calif. L. Rev. 1, 6 (1986) (stating that courts are giving approving attention to the argument that substantive legal relationships with a party may be automatically sufficient to establish jurisdiction). *See also Scophony*, 333 U.S. at 808 (stating that "practical, business conceptions" should be substituted for "hair-splitting legal technicalities"). The First Circuit's parsimonious view of parent-subsidiary relationships, *see, e.g., United*

[Footnote continued on next page]

fendants boast of the worldwide nature of their operations and the integration of their activities.[7]

The plaintiffs also assert that at least some of these Canadian defendants have purposefully engaged in a two-channel distribution system by which vehicles they manufac-

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[Footnote continued from previous page]

Elec., 960 F.2d at 1092-93 (requiring proof of lack of corporate independence, fraudulent intent and manifest injustice before the corporate unit will be ignored), may be ripe for re-examination, particularly in light of the expansive statements these defendants make about North American and global operations, which may indicate they should have fair notice of suit in the United States. Recognizing the close relationship between parents and their subsidiaries (especially in this case) for jurisdictional purposes would also be consistent with the liability rule that, due to a complete unity of interest, the coordinated activity of a parent and its wholly owned subsidiary cannot be considered a conspiracy and must be viewed as that of a single enterprise. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984).

[7] *See, e.g.*, Maier Aff., Ex. 3 (website calling DaimlerChrysler AG "a new global transportation enterprise" and noting that DaimlerChrysler's Canadian production facilities build vehicles for the Canadian and United States markets), Ex. 7 (website noting that Toyota Motor Manufacturing Canada exports to the United States and Mexico), Ex. 8 (website stating that the "many sides" of Nissan are reflected in "13 distinct affiliates in North America"), Ex. 19 (website indicating that DaimlerChrysler is "a truly global company" with a "global workforce, a global shareholder base, globally known brands, and a global outlook") and Ex. 20 (website stating that Daimler Canada makes "large-scale shipments to the United States" and "continued to supply North America and the world with well-known products").

ture flow into the United States, through their parent or related companies, at higher prices; while the same vehicles, distributed in Canada at lower prices, are forbidden export to the United States.[8] (This is the lost discount distribution channel that is the basis of the plaintiffs' antitrust complaint.) This activity (sending higher priced vehicles while withholding lower priced vehicles), they say, is "purposefully directed" at American consumers, and their lawsuit "arises out of or relates to" these arrangements. *See Burger King*, 471 U.S. at 472-73 (internal citations omitted). The defendants, on the other hand, argue that in a constitutional analysis a court should respect the corporate formalities and look at only the contacts of the particular corporate defendant sued, not concern itself with what corporate parents, subsidiaries or siblings may have done.

On this motion, I am dealing with Canadian corporate defendants who are not themselves the parent companies.

(i) Daimler Canada

Daimler Canada manufactures motor vehicles in Canada and sells them to DaimlerChrysler Motors Co., LLC ("Daim-

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[8] In most cases, personal jurisdiction attaches because items are put directly into forums' streams of commerce. In this case, the focus of the complaint is that items are withheld. Although companies can withhold items to avoid being subject to jurisdiction, *cf. Burger King*, 471 U.S. at 472 (citing *World-Wide Volkswagen*, 444 U.S. at 297); *Lerfald v. Gen. Motors Corp.*, Ct. File No. CT 03-003327 (Minn. Dist. Ct. Nov. 7, 2003) (slip op.), at 13, withholding some while sending others may constitute activity directed toward a forum that is sufficient to sustain specific jurisdiction.

ler Motors"), its corporate grandparent.[9] Daimler Canada's Mot. to Dismiss, Fenn Aff. ¶ 8 (Docket Item #52). Daimler Motors purchases and takes title to those vehicles in Canada, and then imports them into the United States. *Id.* (These are the higher priced vehicles.) Daimler Canada's website states that Daimler Canada manufactures vehicles for both the American and Canadian markets, and in addition manufactures some vehicles solely for United States distribution. Maier Aff., Ex. 3. *See also id.*, Ex. 20.

In addition, the evidence shows that Canadian DaimlerChrysler dealers enter into non-export agreements with their consumers. *See id.*, Ex. 14. Purchasers sign these non-export agreements warranting that the vehicle they buy is for use in Canada and not for export. *Id.* They must agree not to export the vehicle from Canada or enter into an agreement whereby the vehicle is leased or sold for use outside of Canada. *Id.* (These are the lower priced vehicles.) On March 1, 2002, Daimler Motors sent a notice to dealers on both sides of the border that vehicle distribution outside the "dealer network" was unacceptable and that Daimler Canada would not provide warranty coverage for vehicles exported from Canada to the United States. *Id.*, Ex. 15. *See also id.*, Ex. 16.

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[9] DaimlerChrysler AG is the parent company of DaimlerChrysler North America Holding Corporation. Daimler Motors is a subsidiary of DaimlerChrysler North America Holding Corporation, and the parent company of DaimlerChrysler Corporation who in turn is the parent company of Daimler Canada. Mercedes-Benz Canada and Mercedes-Benz USA are also subsidiaries of DaimlerChrysler North America Holding Corporation. I am unclear where Mercedes-Benz of North America falls in the corporate structure.

This evidence of targeted distribution and non-export agreements to ensure that only the higher priced version of the same product can be sold to American consumers meets the standard for personal jurisdiction described in *World-Wide Volkswagen*. There, the Supreme Court held that if the sale of a manufacturer's or distributor's product is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly a geographic market, it is not unreasonable to subject the manufacturer or distributor to suit if its merchandise has there been the source of alleged injury. *See World-Wide Volkswagen*, 444 U.S. at 297-98. Daimler Canada has purposefully directed activities toward residents of the United States and this lawsuit arises from economic injuries that arise out of or relate to those activities.

In addition, the gestalt factors align in favor of finding jurisdiction over Daimler Canada. Daimler Canada manufactures vehicles in Canada that are eventually exported to the United States market, and its "center of gravity" is not "located at an appreciable distance from the forum." *Ticketmaster*, 26 F.3d at 210. The forum's interest in adjudicating the dispute, the plaintiffs' interest in obtaining convenient and effective relief, the judicial system's interest in obtaining the most effective resolution of the controversy, and the common interests of all sovereigns in promoting substantive social policies are the same as those I discussed in the CADA analysis, or perhaps stronger in favor of jurisdiction.

Here, the evidence for *prima facie* jurisdictional purposes is sufficient to show that Daimler Canada engaged in a two-fold distribution system directed at American consumers. This arrangement is more than mere product placement into the stream of commerce; this Canadian defendant, as evidenced by websites and sales, clearly anticipates that the vehicles it manufactures will be sold in the United States, and it controls the distribution system of Canadian manufactured

vehicles so as to avoid competing with those American sales. *See Asahi*, 480 U.S. at 112-13. I therefore DENY Daimler Canada's motion to dismiss for lack of personal jurisdiction.

(ii) Toyota Canada

Like Daimler Canada, Toyota Canada distributes vehicles in Canada that are the subject of non-export agreements between Canadian dealers and their customers. Maier Aff., Ex. 13. But non-export agreements alone do not furnish a sufficient basis for specific jurisdiction; Canadian distributors are allowed to put limits on their product placement so as to avoid suit in the United States. *See Burger King*, 471 U.S. at 472 (citing *World-Wide Volkswagen*, 444 U.S. at 297). The plaintiffs also need to show that Toyota Canada purposefully directed activities toward residents of the forum and purposefully availed itself of the forum's benefits and protections. "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* at 474-75 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1953)). To that end, the plaintiffs assert that Toyota Canada manufactures vehicles in Canada and exports them to the United States, *see* Maier Aff., Exs. 2, 7. But they provide no competent evidence to support that assertion. Toyota Canada does purchase vehicles from manufacturing plants in the United States, but it does not manufacture vehicles or sell vehicles (directly or indirectly) for American distribution. Toyota Canada's Mot. to Dismiss, Nichols Decl. ¶¶ 6, 8, 20 (Docket Item #50). The plaintiffs provide evidence that "Toyota" and "Toyota Motor Manufacturing Canada" manufacture vehicles in Canada for export to the United States, Maier Aff., Exs. 2, 7, but they do not provide any evidence that either of these two companies is actually Toyota Canada (or one of its divisions). Instead, Toyota Canada presents uncontradicted evidence that it does not manufacture vehicles in Canada or sell

vehicles for distribution in the United States. Nichols Decl. ¶¶ 6, 8. In fact, Toyota Canada states that Toyota Motor Manufacturing Canada, Inc. is a distinct corporation from Toyota Canada and is not a party to this litigation. Defs.' Joint Reply Mem. at 11 and n.15 (Docket Item #82) (citing http://www.toyota.com/about/operations/na-affiliates /index.html). In short, the plaintiffs have failed to show on even a *prima facie* basis that Toyota Canada has engaged in a two-fold distribution system purposefully directed toward the American market that would support personal jurisdiction. Unless personal jurisdiction can be substantiated on the basis of co-conspirator activity, which I address later, Toyota Canada should be dismissed.

(iii) Nissan Canada and BMW Canada

There is no evidence that Nissan Canada or BMW Canada manufactures vehicles in Canada. They do obtain vehicles from manufacturing plants in the United States (BMW Canada through its parent company) for sole distribution in Canada. Nissan Canada's Mot. to Dismiss, Higgins Decl. ¶ 10 (Docket Item #54); BMW Canada's Mot. to Dismiss, Neville Aff. ¶ 20 (Docket Item #58). But Nissan Canada and BMW Canada are not manufacturers or sellers to the United States that can control the pricing and flow of vehicles in both the United States and Canada. The plaintiffs provide no evidence that Nissan Canada requires its dealers to use non-export agreements. BMW Canada does distribute vehicles in Canada that are subject to non-export agreements between dealers and their consumers. Maier Aff., Ex. 12. But as I said in the Toyota Canada analysis, distributing vehicles in Canada and even controlling that distribution through non-export agreements are alone insufficient to give defendants "fair warning" that they might be sued in the United States. *See Burger King*, 471 U.S. at 472 (citing *World-Wide Volkswagen*, 444 U.S. at 297) (noting that defendants can structure conduct with some minimum assurance as to where that con-

duct will and will not render them liable to suit). Unless personal jurisdiction can be sustained on the basis of co-conspirator activity, addressed later, Nissan Canada's and BMW Canada's motions to dismiss for lack of personal jurisdiction should be granted.

(iv) Mercedes-Benz Canada

Like Toyota Canada, Nissan Canada and BMW Canada, Mercedes-Benz Canada does not manufacture vehicles in Canada. Instead, it obtains vehicles from manufacturing plants in the United States (through its parent company) for sole distribution in Canada. Mercedes-Benz Canada's Mot. to Dismiss, Leigh Aff. ¶ 9 (Docket Item #53). Mercedes-Benz Canada does occasionally sell vehicles in Canada to Mercedes-Benz USA, the exclusive distributor of vehicles into the United States. Mercedes-Benz Canada's Mot. to Dismiss at 3 n.5; Leigh Aff. ¶ 2. These sales account for less than 0.5 percent of Mercedes-Benz Canada's yearly revenue. *Id.* Is this evidence of a dual distribution channel? The plaintiffs have not provided evidence that Mercedes-Benz Canada requires Canadian dealers to sign non-export agreements limiting the use of vehicles outside of Canada; only that Mercedes-Benz of North America, Inc. signs non-export agreements with North American dealers prohibiting use and export outside of North America. Maier Aff., Ex. 14 at 2. I conclude that jurisdictional discovery is warranted, given the fact that Mercedes-Benz Canada does sell some vehicles for distribution in the United States. I therefore **DEFER** action on Mercedes-Benz Canada's 12(b)(2) motion to dismiss for lack of personal jurisdiction pending jurisdictional discovery on the scope of sales of Mercedes-Benz Canada vehicles into the American market (through Mercedes-Benz USA) and concerning the scope of Mercedes-Benz non-export agreements for Canadian vehicles.

(c) The Conspiracy Theory of Jurisdiction

The plaintiffs have provided no evidence to support their allegation that Canadian defendants such as Nissan Canada, BMW Canada, Mercedes-Benz Canada and Toyota Canada were present at the March 2002 New York meeting that discussed the export sales issue.[10] Thus, the only remaining basis for maintaining jurisdiction over Nissan Canada, BMW Canada, Mercedes-Benz Canada or Toyota Canada is the so-called conspiracy theory of jurisdiction. Under this doctrine, the actions of one defendant are attributed to all the co-conspirators in assessing jurisdictional contacts. (Here, for example, CADA's involvement in the 2002 New York meeting would be attributable to all defendants.) However, the First Circuit has never recognized the conspiracy doctrine. *Glaros v. Perse*, 628 F.2d 679, 682 n.4 (1980) ("[W]e do not mean to imply that we would adopt [a] rather liberal approach to conspiracy pleading, or to decide that we would recognize a conspiracy theory of jurisdiction at all."). The Supreme Court has labeled the conspiracy doctrine in the venue context as having "all the earmarks of a frivolous albeit ingenious attempt to expand the statute." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953). As one court has said, using conspiracy as a basis for personal jurisdiction is "[t]hat much more frivolous." *Kipperman v. McCone*, 422 F. Supp. 860, 873 (N.D. Cal. 1976). Another has said that "[t]he conspiracy theory of personal jurisdiction is being rejected by a growing number of courts." *Group Health Plan*

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[10] The plaintiffs allege that representatives of the manufacturing defendants attended the 2002 New York Auto Show meeting to discuss the export "problem." *See* Am. Compl. ¶ 66. However, there are no facts alleged with specificity that any of the Canadian defendants' representatives (other than CADA) were at the New York meeting. *See* Maier Aff., Exs. 10, 11.

v. Philip Morris, Inc., 1999 U.S. Dist. LEXIS 9640, *16 (D. Minn.). Additionally, scholars have been skeptical of the doctrine's conformance to notions of constitutional due process. *See, e.g.*, Ann Althouse, *The Use of Conspiracy Theory to Establish in Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234 (1983). *See also* Stuart M. Riback, Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Colum. L. Rev. 506, 533 (1984) (noting that courts have rejected the conspiracy theory of venue virtually unanimously). For these reasons, I do not believe that the First Circuit would recognize a conspiracy theory of personal jurisdiction, whereby jurisdiction can be obtained over nonresident defendants based upon the jurisdictional contacts of co-conspirators.

III. CONCLUSION

The motions to dismiss for lack of personal jurisdiction of the defendants Canadian Automobile Dealers Association and DaimlerChrysler Canada, Inc. are **DENIED**.

The motions to dismiss for lack of personal jurisdiction of defendants Nissan Canada, Inc.; BMW Canada, Inc.; and Toyota Canada, Inc. are **GRANTED**.

Action on Mercedes-Benz Canada's motion to dismiss for lack of personal jurisdiction is **DEFERRED** pending jurisdictional discovery.

The plaintiffs are allowed limited jurisdictional discovery to determine the scope of sales of Mercedes-Benz Canada vehicles into the American market through Mercedes-Benz USA, whether Mercedes-Benz Canada, Inc. has non-export arrangements with Canadian dealers, and whether Canadian Mercedes-Benz dealers have non-export arrangements with their customers. The Magistrate Judge shall convene a conference of counsel to establish a schedule for this discovery.

SO ORDERED.

DATED THIS 4TH DAY OF MARCH, 2004.

/s/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

[Service List Omitted]

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

IN RE NEW MOTOR VEHICLES CANADIAN EXPORT ANTITRUST LITIGATION	]]]]	MDL Docket No. 1532

ORDER ON JOINT MOTION TO AMEND ORDER TO CERTIFY FOR INTERLOCUTORY APPELLATE REVIEW

The motion of the defendants DiamlerChrysler Canada, Inc. and Mercedes-Benz Canada, Inc. is **GRANTED IN PART**[1] as follows.

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[1] I grant the motion only because I understand that a 28 U.S.C. § 1292(b) appeal does not stay proceedings in this court, *see id.*, and because of these defendants' commitment that if their appeal is unsuccessful they will "accept the outcome of any rulings litigated in this matter . . . regardless of their participation (or lack thereof) in those proceedings." Mot. to Amend at 4. I intend to hold them to that commitment. But for that commitment, I would not grant the motion, for if they are unsuccessful on their appeal and can later relitigate matters resolved while they are pressing their appeal, it would wreak havoc on the progress of this complex multi-district proceeding.

My Order of March 4, 2004, is **AMENDED** to add the following two paragraphs:

A. This Order involves a controlling question of law as to which there is substantial ground for difference of opinion. Specifically, my conclusion that Clayton Act § 12 permits worldwide service of process upon alien corporate defendants in antitrust cases is the subject of disagreement among the Circuits. The First Circuit has not addressed the issue. The other issues these defendants raise, however, do not meet that standard.

B. An immediate appeal from the Order of March 4, 2004, will not materially advance the ultimate termination of the complex multidistrict litigation now before this court. It may, however, materially advance its termination as to these two Canadian parties, because if they are successful on their appeal of this issue, the litigation will terminate as to them. I conclude that the latter eventuality satisfies the requirement of 28 U.S.C. § 1292(b).

SO ORDERED.

DATED THIS 20TH OF APRIL, 2004.

/s/ D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

[Service List Omitted]

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE NEW MOTOR VEHICLES CANADIAN EXPORT ANTITRUST LITIGATION	]]]]	MDL Docket No. 1532

ORDER ON CERTAIN DEFENDANTS' MOTION TO DECLINE SUPPLEMENTAL SUBJECT-MATTER JURISDICTION AND TO DISMISS FOR LACK OF PERSONAL JURISDICTION OVER STATE CLAIMS

I ruled previously in this lawsuit that retail purchasers and lessees can pursue a federal antitrust claim against motor vehicle manufacturers for injunctive relief, but not damages. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp.2d 136, 137 (D. Me. 2004).[1] The plaintiffs then amended their complaint to add various state law claims that would allow a monetary recovery. Some, but not all, of the defendant manufacturers[2] moved to dismiss the state law

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[1] *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977), forecloses a federal antitrust damage remedy to indirect purchasers.

[2] Honda Canada, Inc.; DaimlerChrysler Canada, Inc.; Mercedes-Benz Canada, Inc.; and the Canadian Automobile Dealers' Association ("CADA") ask that I require an independent state-law basis

[Footnote continued on next page]

claims for lack of personal jurisdiction, or on the basis that I should decline supplemental subject matter jurisdiction over the state law claims. After hearing oral argument on August 25, 2004, I conclude, first, that existing personal jurisdiction arising from the federal claim gives me jurisdiction to hear the state law claims (so-called pendent personal jurisdiction). I conclude, second, that I should not decline supplemental subject matter jurisdiction over the state law claims although I have the statutory discretion to do so. The motion to dismiss is therefore **DENIED**.

I. ANALYSIS

(A) Pendent Personal Jurisdiction

When a federal court has jurisdiction over a defendant for a federal claim, pendent personal jurisdiction allows the court to exercise personal jurisdiction as to state law claims based on the same operative facts as the federal claim, even if the state law claims do not themselves provide a basis for personal jurisdiction. *Action Embroidery Corp. v. Atl. Em-*

[Footnote continued from previous page]

(not present here) for asserting personal jurisdiction on the state-law claims. DaimlerChrysler Canada, Inc.; Mercedes-Benz Canada, Inc.; and CADA substantively challenge the adoption of pendent personal jurisdiction. American Honda Motor Co., Inc.; Honda Canada, Inc.; DaimlerChrysler Corporation; DaimlerChrysler Motors Co., LLC; DaimlerChrysler Canada, Inc.; Mercedes-Benz USA, LLC; and Mercedes-Benz Canada, Inc. all argue that even if personal jurisdiction exists, I should decline supplemental jurisdiction over the state-law claims. The following defendants support this Court's jurisdiction: General Motors Corporation; General Motors of Canada, Ltd.; Ford Motor Company; Ford Motor Company of Canada, Ltd.; Toyota Motor Sales, USA, Inc.; Nissan North America, Inc.; and BMW of North America, LLC.

broidery, Inc., 368 F.3d 1174, 1180 (9th Cir. 2004) (citations omitted). The Second, Third, Fourth, Seventh, Ninth, Tenth, and D.C. Circuits have all recognized pendent personal jurisdiction explicitly. *See IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056-57 (2d Cir. 1993); *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 555-56 (3d Cir. 1973); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 628-29 (4th Cir. 1997); *Robinson Eng'g Co. Pension Plan and Trust v. George*, 223 F.3d 445, 449-50 (7th Cir. 2000); *Action Embroidery*, 368 F.3d at 1181; *United States v. Botefuhr*, 309 F.3d 1263, 1272-75 (10th Cir. 2002); *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1, 5 (D.C. Cir. 1977). Quoting the Tenth Circuit, the Ninth Circuit observed in 2004 that "every circuit court of appeals to address the question [has] upheld the application of pendent personal jurisdiction." *Action Embroidery*, 368 F.3d at 1181 (quoting *Botefuhr*, 309 F.3d at 1273). I recognized pendent personal jurisdiction in this District in 2000. *Andrews v. Emerald Green Pension Fund*, 2000 U.S. Dist. LEXIS 14545, at *23-24 (D. Me. Sept. 27, 2000). Once again, I conclude that the First Circuit will recognize pendent personal jurisdiction, agreeing with the other seven Circuits that have addressed the issue.

In an earlier ruling, I found personal jurisdiction over certain Canadian defendants on the federal antitrust claim that motor vehicle manufacturers had conspired to avoid price competition by keeping Canadian motor vehicles out of the American market, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp.2d 145, 147 (D. Me. 2004). In a Second Amended Complaint, the plaintiffs have added state law claims under state antitrust statutes, consumer protection statutes and the common law of unjust enrichment. The new claims arise out of the same underlying facts (the asserted conspiracy to avoid price competition) as those supporting the federal claim. (In adding the state claims the plaintiffs did not significantly alter the factual allegations of their complaint.) Therefore, pendent personal jurisdiction

provides jurisdiction over these same defendants for the state law claims, because they arise out of the same nucleus of operative facts. *Action Embroidery*, 368 F.3d at 1180.

To be sure, Circuits that recognize pendent personal jurisdiction also say that the district court has discretion not to assert the jurisdiction. *See, e.g.*, *Action Embroidery*, 368 F.3d at 1181 (quoting *Oetiker*, 556 F.2d at 5 ("[T]he district court may have discretion to dismiss the pendent claims where considerations of judicial economy, convenience and fairness to the litigants so dictate.")). For the reasons I articulate below in discussing the discretionary decision over supplemental subject matter jurisdiction, I conclude that asserting jurisdiction here is a proper exercise of discretion. "[I]t is often reasonable to compel [a] defendant to answer other claims in the same suit arising out of a common nucleus of operative facts." *Action Embroidery*, 368 F.3d at 1181. Here, it is in the interest of "judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties." *Id.*

Contrary to the defendants' argument, I conclude that the existence of personal jurisdiction as to the federal antitrust claim satisfies constitutional due process requirements for personal jurisdiction as to the state law claims as well. *See id.*; *ESAB*, 126 F.3d at 628-29. Where the federal and state law claims arise out of the same nucleus of operative facts, "according to the weight of authority, due process would not prevent obliging the defendant to defend against the state claim along with the federal claim under the doctrine of pendent personal jurisdiction." 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1069.7 at

228-29 (3d ed. 2002).[3] The defendants argue that their case is unique: that for the state law claims, the plaintiffs can obtain personal jurisdiction over these defendants in *no* state forum in the United States[4] and therefore should not be permitted to pursue their state claims in this federal court. I do not understand why that argument should succeed.[5] As the Fourth Circuit said in *ESAB*,

> Once a court has a constitutional case, in the Article III sense, properly before it, service by a court sufficient to assert personal jurisdiction over a defendant by any authorized mechanism consistent with due process may be held to apply to the entire constitutional

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[3] "Thus, a defendant who already is before the district court to defend a federal claim is unlikely to be severely inconvenienced by being forced to defend a state claim whose issues are nearly identical or substantially overlap. Notions of fairness simply are not offended in this circumstance." 4B Wright & Miller, *supra*, § 1117 at 189. To the degree that there is a need to consider the fairness of the forum, *see generally* 4 Wright & Miller, *supra*, § 1068.1, I observe that the Judicial Panel on Multidistrict Litigation's action in consolidating all the lawsuits and transferring them to Maine, a jurisdiction immediately adjacent to Canada, operated to reduce the burden on the Canadian defendants.

[4] It became apparent at oral argument that the plaintiffs do not agree with this assertion.

[5] For example, a plaintiff may obtain personal jurisdiction over a defendant in Mississippi state court to assert a claim based upon Arkansas law, even though he could not obtain personal jurisdiction in Arkansas. I do not see why it should matter that the personal jurisdiction is obtained in a federal court instead of a state court.

> case. . . . Since the court has personal jurisdiction over the defendants . . ., we can find no constitutional bar to requiring the defendants to defend the entire constitutional case, which includes both federal and state claims arising from the same nucleus of facts, so long as the federal claim is not wholly immaterial or insubstantial.

126 F.3d at 628-29.

Nevertheless, certain defendants argue that the First Circuit will not accept pendent personal jurisdiction because of its holding in *Moreno v. United States*, 120 F.2d 128 (1st Cir. 1941). In *Moreno*, a widow sued the government in federal court in Massachusetts, seeking benefits under a war risk insurance policy insuring her deceased husband. *Id.* at 129. Section 19 of the World War Veterans' Act, 1924, permitted the United States to implead into such a lawsuit anyone else claiming an interest in the insurance policy, regardless of where he or she lived. Accordingly, the government impleaded the policy's named beneficiary, a woman who lived in New Jersey. Subsequently, the plaintiff widow tried to add a direct claim for damages against the New Jersey resident for alienation of affections. Both the district court and the First Circuit held that she could not. *Id.* at 130.

The pendent state claim the plaintiff sought to raise in *Moreno* (alienation of affections) was *not* related to the underlying federal claim (entitlement to benefits under a government insurance policy). Pendent personal jurisdiction exists when the state claims for which there is no independent basis for jurisdiction and the federal claim for which there is personal jurisdiction *do* "arise[] out of a common nucleus of operative facts." *See Action Embroidery*, 368 F.3d at 1180 (citations omitted). Thus, the 1941 *Moreno* decision is not inconsistent with the later recognized doctrine of pendent personal jurisdiction. *Accord Amtrol, Inc. v. Vent-Rite Valve*

Corp., 646 F. Supp. 1168, 1174 n.4 (D. Mass. 1986) (distinguishing *Moreno* and applying doctrine of pendent personal jurisdiction); *Bertozzi v. King Louie Int'l, Inc.*, 420 F. Supp. 1166, 1172 n.3 (D.R.I. 1976) (adopting narrow interpretation of *Moreno*). *But see Wilensky v. Standard Beryllium Corp.*, 228 F. Supp. 703, 706 (D. Mass. 1964).

Therefore, pendent personal jurisdiction permits jurisdiction over the Canadian defendants on the state law claims.

(B) Supplemental Subject Matter Jurisdiction

Because there is subject matter jurisdiction over the federal antitrust claim, 28 U.S.C. § 1367 also grants supplemental jurisdiction over "all other claims that are so related to [the federal claim] that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (1993). The state law claims meet that standard. Certain defendants argue, however, that I should decline supplemental subject matter jurisdiction over the state law claims. The statute provides: "[D]istrict courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the claim substantially predominates over the claim or claims over which the district court has original jurisdiction. . . ." 28 U.S.C. § 1367(c)(2). According to the First Circuit, this language accords a district court "'broad discretion.'" *Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 37 (1st Cir. 2003) (quoting *Vera-Lozano v. Int'l Broad.*, 50 F.3d 67, 70 (1st Cir. 1995)). The focus is on "the totality of the circumstances" and consideration of issues such as "comity, judicial economy, convenience, fairness and the like." *Che*, 342 F.3d at 37 (*citing Roche v. John Hancock Mut. Life*

Ins. Co., 81 F.3d 249, 257 (1st Cir. 1996); *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995)).[6]

The defendants focus primarily on convenience and judicial economy. They argue that accepting jurisdiction will vastly complicate discovery, class certification issues and trial. They point out the need for proof of in-state effects for some state laws, but highlight especially the damage difficulties, asserting that my *Illinois Brick* ruling removed the damage remedy from the case as it was then structured, and that the new state law claims will restore damage issues, with difficult variations from state to state.

First, I conclude that the projected discovery difficulties will be manageable. State law discovery will go forward, at least as to some states, regardless of what I do on this motion, because there are parallel lawsuits pending in a number of state courts. Fortunately, the parties have been cooperating in efforts to coordinate discovery in this federal multidistrict lawsuit with that in the state court lawsuits. Already, a number of the state jurisdictions have entered orders coordi-

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[6] The Third Circuit is arguably stricter in limiting district judges' discretion to decline supplemental jurisdiction. It holds that the "substantially predominate" standard is "a limited exception to the operation of the doctrine of pendent jurisdiction—a doctrine that seeks to promote judicial economy, convenience, and fairness to litigants by litigating in one case all claims that arise out of the same nucleus of operative fact." *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 789 (3d Cir. 1995). Jurisdiction should be declined "only where there is an important countervailing interest to be served by relegating state claims to state court," "normally . . . the case only where 'a state claim constitutes the real body of a case, to which the federal claim is only an appendage.'" *Id.* (citation omitted).

nating their discovery procedures with the federal action. The addition of some discovery issues to this multidistrict litigation is not enough to reject the state law claims.

Second, I will deal with class certification issues when the case reaches that stage.[7]

Third, I do not find the asserted trial difficulties to be especially significant. Moreover, under current Supreme Court precedent, *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998), these cases will all return to the districts where they originated once pretrial proceedings are complete. Some of the state law variations, therefore, will be handled by judges familiar with local law.

Two additional observations. First, this is a multidistrict lawsuit. Such lawsuits are expected to be complex. The Judicial Panel on Multidistrict Litigation gathers lawsuits from around the country and transfers them to a district with time and resources to deal with that complexity. It would be unhelpful in such a context to reject claims on the basis of complexity. Second, it is true that my earlier *Illinois Brick* ruling eliminated damages as the lawsuit was then structured. I never expected damages to go away entirely, however. The plaintiffs' lawyers assured me at oral argument on that earlier motion that they would add parties to avoid *Illinois Brick* if I

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[7] I am puzzled by the defendants' reliance upon *Jones v. Ford Motor Credit Co.*, 358 F.3d 205 (2d Cir. 2004) in their Reply Mem. at 6 n.3. *Jones* stated that before a class has been certified "district courts should normally not dismiss the claims based solely on the problems that could arise if the class is eventually certified." *Id.* at 215 n.9 (emphasis added) (citation omitted). No class has yet been certified in this case. Moreover, *Jones* counseled the district judge to craft the class certification order to avoid the supplemental jurisdiction issue. *Id.* at 216.

ruled against them (as I did); I recognized that prediction in the decision itself. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp.2d at 138-41. Although the plaintiffs have chosen not to follow their predicted course, but to add state claims instead, I have always expected that this multidistrict lawsuit, if it proceeded, would have to deal with damages. I am surprised if any of the lawyers thought otherwise. Moreover, even if I had the unexpected luxury of dealing only with liability and injunctive relief, I am sure that in discovery and at trial the parties would be discussing numbers related to damages. After all, the whole premise of this lawsuit is that the defendants' conduct resulted in illegal price differentials between Canadian and American cars, and that American consumers had to pay extra. Even to secure injunctive relief, the plaintiffs presumably will be required to prove such facts, and the defendants presumably will be arguing that any price differentials would have existed regardless. Argument over the scope of any injunction could also lead to consideration of such issues.

Yes, it would be easier for this individual federal judge not to have to address a variety of state laws in resolving the recently filed motion to dismiss or, if the claims survive the motion to dismiss, in the inevitable summary judgment practice to come. But accepting a multidistrict case means recognizing the likelihood of dealing with other laws. After all, not all multidistrict cases are premised on federal question jurisdiction. (Indeed, one might expect that if these state law claims were individually filed in other districts or were filed in state court and removed to federal court on the basis of diversity of citizenship, the Multidistrict Panel would send them to this District in any event.)

In this case, all the claims, state and federal, derive from the same underlying factual assertions. The heart of the case is still the alleged antitrust violation. The state issues are not "more important, more complex, more time consuming to

resolve, or in any other way more significant than their federal counterparts." *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 790 (3d Cir. 1995), even though they make possible a wider remedy. *See In re Stat-Tech Secs. Litig.*, 905 F. Supp. 1416, 1426 (D. Colo. 1995) (asserting supplemental jurisdiction because "[w]hile state law may predominate in terms of the comprehensiveness of remedies sought on the remaining state law claims, all of the Trust's claims stem from the same alleged misconduct of defendants").

I conclude that this single coordinated and consolidated pretrial proceeding in the District of Maine best furthers convenience, fairness, judicial economy, and reduction of cost and expense for the parties. Federal-state comity has not been argued, but I observe that a number of the state courts with parallel lawsuits are joining the Consolidation Order that California Superior Court Judge Richard Kramer and I entered at the parties' joint request. I see no negative comity factors. In short, dealing with all the claims in the District of Maine furthers both the administration of justice and the goals of multidistrict litigation.[8]

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[8] The moving defendants claim that acceptance of jurisdiction over the state law claims that allow indirect purchasers to sue for damages violates federal policy against indirect purchaser suits and will lead to re-litigation of issues decided in my earlier order, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp.2d at 144. I disagree. The exercise of supplemental jurisdiction over the state claims does not violate federal policy against indirect purchaser suits for federal antitrust law or re-litigate issues decided in my previous order. *See California v. ARC Am. Corp.*, 490 U.S. 93, 103-05 (1989) (finding that state statutes allowing recovery for indirect purchasers do not interfere with federal policy or remedies and that federal courts may accept or decline supple-

[Footnote continued on next page]

In light of these considerations, I choose to exercise both supplemental jurisdiction over the newly-raised state-law claims and pendent personal jurisdiction over the moving defendants as to all state claims in the Second Amended Complaint.

III. CONCLUSION

The Motion to Decline Supplemental Subject-Matter Jurisdiction and to Dismiss for Lack of Personal Jurisdiction Over State-Law Claims is **DENIED**.

SO ORDERED.

DATED THIS 7TH DAY OF SEPTEMBER, 2004.

/s/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

[Service List Omitted]

[Footnote continued from previous page]

mental jurisdiction over state law indirect purchaser claims); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 275 (D. Mass. 2004).

FILED
FEB 2 - 2005
OFFICE OF THE CLERK

No. 04-736

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CANADA, INC. and
MERCEDES-BENZ CANADA, INC.
Petitioners,

v.

GEORGE JAYNES, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The District Court certified for interlocutory review the issue of whether Section 12 of the Clayton Act permits worldwide service of process upon corporate defendants in antitrust cases. Respondents opposed Petitioners' subsequent application for permission to file an interlocutory appeal before the First Circuit Court of Appeals, arguing that review of the certified issue was premature and that the order certified in fact involved no controlling question of law. In a simple order without explanation of its reasons, the First Circuit Court of Appeals declined in its discretion to accept the certified issue for interlocutory appeal. Petitioners filed the instant petition for writ of certiorari before this Court.

The question presented is:

> Should this Court grant the petition for writ of certiorari to review an order declining, without analysis, to permit interlocutory appeal of a ruling that does not meet the requirements for interlocutory appeal?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner and Defendant DaimlerChrysler Canada, Inc. ("Daimler Canada"), a corporation organized under the Canada Business Corporations Act, is a wholly owned subsidiary of DaimlerChrysler Corporation, a Delaware corporation wholly owned in turn by DaimlerChrysler Motors Company, LLC, a Michigan limited liability company that is wholly owned by DaimlerChrysler North American Holding Company ("DCNA"), a Delaware Corporation. DCNA is a wholly owned subsidiary of DaimlerChrysler AG, a publicly traded stock corporation organized under the laws of the Federal Republic of Germany.

Petitioner and Defendant Mercedes-Benz Canada, Inc. ("Mercedes Canada"), a corporation organized under the Canada Business Corporations Act, is a wholly owned subsidiary of DCNA.

Respondents George C. Jaynes, Jane A. Jaynes, Cathy-Ann Accomando, Richard Jaffe, Lisa Saizon, Daniel E. Herschberg, Deborah McComb, Andre Rodriguez, Barry Cushner, Jeffrey Coe, Bruce B. Belodoff, Lisa Baade and Perry Sadoff are natural persons.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
COUNTER-STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. THE PETITION CHALLENGES A RULING AS TO WHICH THE COURT OF APPEALS HAS ABSOLUTE DISCRETION	4
II. THIS CASE IS NOT RIPE FOR REVIEW	8
III. THE CIRCUIT COURT DID NOT ERR IN DENYING PERMISSION FOR INTERLOCUTORY APPEAL	9
A. Petitioners Failed to Demonstrate that the Certified Order Contained a "Controlling Question of Law" whose Resolution Would "Materially Advance" this Litigation	10
B. There is No Substantial Difference of Opinion Regarding the District Court's Jurisdictional Rulings	11
IV. THE DISTRICT COURT DID NOT ERR IN ITS INTERPRETATION OF SECTION 12 OF THE CLAYTON ACT	12
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174 (9th Cir. 2004)	12
American Constr. Co. v. Jacksonville, T. & K. W. R. Co., 148 U.S. 372 (1893)	8
Armco Steel Corp. v. United States, 490 F.2d 688 (8th Cir. 1974)	6
Ashmore v. Northeast Petroleum, 855 F. Supp. 438 (D. Me. 1994)	10
Bank of New York v. Hoyt, 108 F.R.D. 184 (D.R.I. 1985)	10
Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 (1934)	8
Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co. 389 U.S. 327 (1967)	9
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	5, 10
Fisons, Ltd. v. United States, 458 F.2d 1241 (7th Cir. 1972)	6
Gialde v Time, Inc. 480 F.2d 1295 (8th Cir. 1973)	6
Go-Video, Inc. v. Akai Elec. Co. Ltd., 885 F.2d 1406 (9th Cir. 1989)	12
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)	8
Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)	8
In re April 1977 Grand Jury Subpoenas, 584 F.2d 1366 (6th Cir. 1978)	6
In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288 (3d Cir. 2004)	12, 13
In re Bank of New England Corp., 218 B.R. 643 (1st Cir. 1998)	10

TABLE OF AUTHORITIES—Continued

	Page
In re MTBE Prods. Liab. Litig., 174 F. Supp. 2d 4 (S.D.N.Y. 2001)	11, 12
In re Ulpiano Unanue Casal, 998 F.2d 28 (1st Cir. 1993	10
Kraus v. Board of County Comm'rs, 364 F.2d 919 (6th Cir. 1966)	5, 6
Milbert v. Bison Laboratories, Inc., 260 F.2d 431 (3d Cir. 1958)	7
Minnick v. California Dep't of Corrections, 452 U.S. 105 (1981)	7
Paschall v. Kansas City Star Co., 605 F.2d 403 (8th Cir. 1979)	11
Rezzonico v. H & R Block, Inc., 182 F.3d 144 (2d Cir. 1999)	6
Simmons v. West Haven Housing Authority, 399 U.S. 510 (1970)	7
Southern R. Co. v. King, 217 U.S. 524 (1910)	5
Ticketmaster-New York v. Alioto, 26 F.3d 201 (1st Cir. 1994)	3
Virginia Military Inst. v. United States, 508 U.S. 946 , 113 S. Ct. 2431 (1993)	9
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	3

STATUTES

15 U.S.C. §22	12
28 U.S.C. §1254(1)	*passim*
28 U.S.C. §1292	9

OTHER AUTHORITIES

United States Supreme Court Rule 10	9, 11
House Report No. 1667, 85 Cong.2d Sess., pp. 1, 2	7

IN THE

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On Petition for a Writ of Certiorari to the United State Court of Appeals for the First Circuit

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion of the First Circuit Court of Appeals (Pet. App. 1a) is unreported. The District Court's Memorandum Decision and Order on Defendants' Motion to Dismiss for Lack of Personal Jurisdiction (Pet. App. 2a-25a) is reported at 307 F. Supp. 2d 145 (D. Me. 2004). The District Court amended its decision in an unreported opinion (Pet. App. 26a-27a) on April 20, 2004.

JURISDICTION

The First Circuit Court of Appeals entered its order denying permission for interlocutory appeal on August 3, 2004. On October 20, 2004, Justice Souter extended the time within which Petitioners could file a petition for a writ of certiorari to December 1, 2004, and the petition was filed on November 30, 2004. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

COUNTER-STATEMENT OF THE CASE

In their First Amended Consolidated Complaint ("FACC") plaintiffs alleged that Mercedes Canada, Daimler Canada and other American and Canadian automobile manufacturers and trade associations conspired with U.S and Canadian automobile dealers to prevent new motor vehicles purchased in Canada from entering the United States. Pet. App. 2a-3a. The FACC alleged that by means of this conspiracy, the named defendants suppressed and restrained interbrand competition for new motor vehicles, maintained U.S. new motor vehicle prices at artificially high levels and restricted the supply and/or output of new motor vehicles in the U.S. Pet. App. 2a-3a.

In Motions to Dismiss dated October 31, 2004, Defendants Mercedes Canada and Daimler Canada moved to dismiss this case for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). In a March 4, 2004 Memorandum Decision and Order, the District Court denied Daimler Canada's motion to dismiss and deferred ruling on Mercedes Canada's motion. Pet App. 3a. The District Court concluded that "the second, worldwide service, clause of section 12 is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with an alien venue statute." Pet. App. 6a. The court then observed that, with regard to Daimler Canada, the evidence showed that Daimler Canada dealers entered into non-export agree-

ments with their consumers, and sent a notice to dealers on both sides of the border that vehicle distribution outside the "dealer network" was prohibited, and that Daimler Canada would not provide warranty coverage for vehicles exported from Canada to the United States. Resp. App. 18a-19a. The District Court concluded that these activities met the standard for personal jurisdiction set out in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), and further determined that the gestalt factors set out in *Ticketmaster-New York v. Alioto*, 26 F.3d 201, 207 (1st Cir. 1994), aligned in support of jurisdiction over Daimler Canada. Pet. App. 19a.

As to Mercedes Canada, the District Court held that "I therefore *defer* action on Mercedes-Benz Canada's 12(b)(2) motion to dismiss for lack of personal jurisdiction pending jurisdictional discovery on the scope of sales of Mercedes Benz-Canada vehicles into the American market (through Mercedes-Benz USA) and concerning the scope of the Mercedes-Benz non-export agreements for Canadian vehicles." Pet. App. 22a (emphasis in original).

On May 4, 2004, Mercedes Canada and Daimler Canada ("Petitioners") filed a Petition for Permission to Appeal an Interlocutory Order in the First Circuit Court of Appeal. In their brief, Petitioners argued that substantial differences of opinion existed among the Circuit Courts of Appeals as to two issues in the order below: (1) whether plaintiffs can establish personal jurisdiction under Section 12 of the Clayton Act without first establishing venue under that statute; and (2) whether the "stream of commerce" doctrine could be used to establish minimum contacts sufficient to demonstrate jurisdiction.[1] Resp. App. 4a-5a. In their brief in opposition, Respondents urged that the First Circuit reject the request for

[1] In their Petition before this Court, Petitioners have abandoned the latter question as an issue presented for interlocutory review. Pet. Brief at i.

interlocutory review of the certified order because, inter alia, (1) such review was premature, in that a successful appeal would have disposed of claims against but one of seventeen defendants and because such an appeal might be moot after further jurisdictional discovery; and (2) no substantial difference of opinion existed as to the effect of the second clause of Section 12 of the Clayton Act. Resp. App. 24a. In an opinion dated August 3, 2004, the First Circuit declined without analysis to accept the interlocutory appeal. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

Petitioners must fail in their request for review of the lower court's bare denial of their application for permission to file an interlocutory appeal, a decision committed to that court's complete discretion. Moreover, even if this Court were to consider whether the Circuit Court erred by denying permission for interlocutory appeal, it should conclude that the jurisdictional arguments proffered by Petitioners implicate no substantial difference of controlling law. Finally, if this Court were to depart from its historic practices to consider the merits of an argument never considered by the Court of Appeals, it should conclude that the District Court correctly construed section 12 of the Clayton Act.

I. THE PETITION CHALLENGES A RULING AS TO WHICH THE COURT OF APPEALS HAS ABSOLUTE DISCRETION

Petitioners' brief is virtually silent as to a defect that fatally undermines the argument they urge the Court take up in this appeal. Petitioners appeal not from an interlocutory decision of the First Circuit Court of Appeal regarding jurisdiction under the Clayton Act, but from an order in which the lower court simply declined, in the exercise of its discretion, to consider the merits of their arguments at this early stage in the proceedings. Because the Circuit Court never reached the merits of Petitioners' jurisdictional arguments, this Court

should decline to review them upon this Petition for Writ of Certiorari.[2]

Both the text of 28 U.S.C. §1292 (b), relating to interlocutory review of district court orders, and courts interpreting this provision leave no doubt that appellate review of the merits of an order certified under this statute occurs only after the Circuit Court grants an application for such review:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, *in its discretion*, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . .

28 U.S.C. §1292 (b) (emphasis added).[3] The Courts of Appeals are granted absolute discretion to accept or reject appeal

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[2] Indeed, if this Court were to reverse the First Circuit's ruling, it could only command that court to accept the certified order for review on the merits. *Southern R. Co. v. King*, 217 U.S. 524 (1910) (noting that when a constitutional question is not made or passed upon in the lower court, the court of review will not consider it). This is plainly not the remedy sought by Petitioners, who exhort this Court to "provide the lower courts with much-needed guidance over an important and recurring question of federal antitrust law." Pet. Brief at 7.

[3] *See also Coopers & Lybrand v Livesay*, 437 U.S. 463, 474-75 (1978) (criticized in *McCormack v Amsouth Bank, N.A.*, 759 So. 2d 538, 540 (Ala. 1999) and superseded by statute on other grounds as stated *in Rivera v Veterans Mem. Med. Ctr.* 262 Conn. 730, 736 n.8 (Conn. 2003)); *Kraus v. Board of County Comm'rs*, 364 F.2d 919, 921 (6th Cir. 1966) (observing that the grant of interlocutory "appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the

under 28 U.S.C. §1292(b). *Kraus*, 364 F.2d at 921; *Gialde v Time, Inc.* 480 F.2d 1295 (8th Cir. 1973).

The federal Courts of Appeals rigorously observe the distinction between their gatekeeping function in deciding applications for permission to file an interlocutory appeal and their consideration of the merits of such appeals. The Second Circuit notes that "[w]e have previously held when considering an appellate court's grant of leave to appeal under 28 U.S.C. §1292 (b) that a motions panel's grant of such leave is provisional since the merits panel that hears the certified appeal is free to review that subject again." *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999) (internal quotations and citation omitted); *see also In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1368 (6th Cir. 1978) (noting that merits are considered only after permission for interlocutory review is granted); *Armco Steel Corp. v. United States*, 490 F.2d 688, 690 (8th Cir. 1974) (same); *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1249 (7th Cir. 1972) (same).

Indeed, the discretion accorded Circuit Courts in determining whether to grant such applications is so great that Congress has ensured that orders denying application for review under Section 1292(b) need contain no analysis or statement of reasons:

> It should be made clear that if application for an appeal from an interlocutory order is filed with the court of appeals, the court of appeals may deny such an application without specifying the grounds upon which such a denial is based. It could be based upon a view that the question involved was not a controlling issue. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained

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same manner that the Supreme Court today refuses to entertain applications for writs of certiorari").

> for too long a period of time. But whatever the reason, *the ultimate determination* concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals.

House Report No. 1667, 85 Cong.2d Sess., pp. 1, 2 (cited in *Milbert v. Bison Laboratories, Inc.*, 260 F.2d 431, 434 (3d Cir. 1958) (emphasis added). Indeed, because a request for appellate interlocutory review may be denied merely because a court's docket is too voluminous, there may be no analysis of the merits for the court to offer in any event.

Because the First Circuit, consistently with the guidance of Congress, was silent in its order as to the reasons for its denial of Petitioners' request for interlocutory appeal, this Court cannot ascertain whether the lower court's denial of permission to appeal rested on any constitutional ground at all. This Court assiduously avoids review on such an ambiguous record. *Simmons v. West Haven Housing Authority*, 399 U.S. 510, 511 (1970) ("Because of an ambiguity in the record concerning the underlying reason these appellants were denied an opportunity to appeal the trial court's judgment ordering that they be evicted, we now conclude that this appeal should be dismissed."); *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 127 (1981) (declining to address constitutional issues posed in a petition for writ of certiorari in a case where the record contained ambiguities and the case was going back for further proceedings in the trial court).

This reticence is especially apt where, as here, further development of the factual record below may render any appeal moot. The District Court explicitly deferred ruling on Mercedes Canada's motion to dismiss pending the results of jurisdictional discovery. In the absence of such discovery and of any final disposition of Mercedes Canada's motion, it is impossible to determine on this undeveloped record whether the certified order in fact implicates a controlling question of

law. Depending on the results of the discovery, the District Court may grant Mercedes Canada's motion to dismiss on jurisdictional grounds, in which case its appeal of the certified order would be moot.

Alternatively, jurisdictional discovery may produce evidence suggesting that Mercedes Canada had sufficient contacts with a relevant state to justify personal jurisdiction without resorting to the District Court's interpretation of the venue and service provisions of Section 12 of the Clayton Act. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294 (1981) (declining to pass on the constitutionality of a statute in the absence of "an actual factual setting that makes such a decision necessary"); *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 213 (1934) (holding that "[w]e are in accord with the view that it is inexpedient to determine grave constitutional questions" where there exists "reasonable likelihood" that further proceedings could help clarify the issues).[4]

II. THIS CASE IS NOT RIPE FOR REVIEW

Even if the First Circuit had issued an order on the merits of the jurisdictional question rather than a denial of permission to appeal, certiorari would be inappropriate for such an interlocutory decision. "[T]his court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893); *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the

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[4] Accordingly, even if the jurisdictional issue Petitioners raise were a "pure question of law" (Pet. Brief at 29), the necessity of reaching this question would be a question of fact that can be resolved only through further discovery.

writ is not issued until final decree."); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari, holding "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst. v. United States*, 508 U.S. 946, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring in the denial of certiorari, and noting that the Court will "generally await final judgment in the lower courts before exercising our certiorari jurisdiction").[5]

Petitioners cannot point to any "extraordinary inconvenience or embarrassment" justifying departure from this Court's long-standing hesitance to review interlocutory decisions. Because the District Court explicitly deferred ruling on the jurisdictional motion of Mercedes Canada pending further discovery, resolution of the jurisdictional question might result in no savings to Petitioners. The results of the ongoing jurisdictional discovery may permit the District Court to exercise personal jurisdiction over Mercedes Canada without resorting to the national contacts analysis contested by Petitioners in their brief.

III. THE CIRCUIT COURT DID NOT ERR IN DENYING PERMISSION FOR INTERLOCUTORY APPEAL

Even if this Court were to consider the propriety of the Circuit Court's discretionary denial of Petitioners' request for permission to file an interlocutory appeal, it should conclude that the Circuit Court did not err. In order to pursue their interlocutory appeal, Petitioners were required to demonstrate

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[5] Petitioners' citation at pages 27-28 of their Petition to cases in which Circuit Courts have taken up their jurisdictional concerns on interlocutory appeal are inapposite, in that they implicate a standard distinct from that by which this Court grants a Petition for Writ of Certiorari. *See* 28 U.S.C. §1292 (setting out standard for interlocutory appeals); U.S. Sup. Ct. R. 10 (setting out standard for granting petitions for writ of certiorari).

to the Circuit Court that the order sought to be reviewed: (a) "involves a controlling question of law as to which" (b) "there is substantial ground for difference of opinion," and (c) "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. §1292 (b); *In re Ulpiano Unanue Casal*, 998 F.2d 28, 32 (1st Cir. 1993). As the parties urging the appeal, Petitioners had the burden of satisfying all three factors. *Coopers*, 437 U.S. at 474-75. Petitioners' failures to satisfy each of these criteria provided independent bases for the Circuit Court's denial of their application for permission to file an interlocutory appeal.

A. Petitioners Failed to Demonstrate that the Certified Order Contained a "Controlling Question of Law" whose Resolution Would "Materially Advance" this Litigation

The fact that the certified order itself was not even final doomed Petitioners' attempt to demonstrate a controlling question of law. There is substantial overlap in the appeals court's analysis of whether the certified order involves a controlling question of law and whether the resolution of this question would materially advance the litigation. *In re Bank of New England Corp.*, 218 B.R. 643, 654 n.21 (1st Cir. 1998) (The element of materially advancing the litigation "overlaps the 'controlling question of law' factor, in that both are directed toward assuring that interlocutory review will advance the resolution of the underlying action."). If the contours of a case will be essentially the same in terms of the scope of discovery or the length and complexity of the trial, appeal should not be permitted. *Bank of New York v. Hoyt*, 108 F.R.D. 184, 189 (D.R.I. 1985); *Ashmore v. Northeast Petroleum*, 855 F. Supp. 438, 440 (D. Me. 1994).

As discussed above, the District Court explicitly deferred ruling on Mercedes Canada's motion pending jurisdictional discovery. Section 1292(b) does not permit the appeal of

decisions whose finality turns on further development of the factual record. *Paschall v. Kansas City Star Co.*, 605 F.2d 403, 406 (8th Cir. 1979) (holding that "[t]he purpose of section 1292(b) is not to offer advisory opinions 'rendered on hypotheses which (evaporate) in the light of full factual development'") (citation omitted). Accordingly, this Court should decline to consider arguments that may be rendered moot.

B. There is No Substantial Difference of Opinion Regarding the District Court's Jurisdictional Rulings

While petitions for writ of certiorari may be granted when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," U.S. Sup. Ct. Rule 10(a), a higher standard must be met to demonstrate a "substantial ground for difference of opinion" for the purposes of interlocutory appeal. In meeting this standard, "[n]either disagreement outside the Circuit, nor the mere presence of a disputed issue that is a question of first impression in this Circuit demonstrate a substantial ground for a difference of opinion." *In re MTBE Prods. Liab. Litig.*, 174 F. Supp. 2d 4, 8 (S.D.N.Y. 2001) (noting that "section 1292(b) is not intended to be a 'vehicle to provide early review of difficult rulings in hard cases'") (citations omitted). Indeed, so long as the District Court's "conclusion is supported by other court . . . there is no substantial difference of opinion warranting an 'exception to the general policy against piecemeal appellate review embodied in the final judgment rule.'" *Id.* (citation omitted)

Because the District Court's well-founded reading of Section 12 of the Clayton Act is supported by the decisions of multiple Circuit Courts of Appeals, Petitioners were unable to demonstrate a substantial difference of opinion to the court below. In its March 4, 2004 Order, the District Court found,

consistent with the Ninth and Third Circuits, that "the second, worldwide service, clause of section 12 is available in anti-trust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with the alien venue statute [§1391(b)]." Pet. App. 6a (citing *Go-Video, Inc. v. Akai Elec. Co. Ltd.*, 885 F.2d 1406, 1413 (9th Cir. 1989)); *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 292-93 (3d Cir. 2004). Because the District Court's opinion is thus supported not only by "other courts," but also by a majority of Circuit Courts to have considered this issue, there can be no substantial dispute about its conclusions for the purposes of interlocutory appeal. *MBTE*, 174 F. Supp. 2d at 8.

IV. THE DISTRICT COURT DID NOT ERR IN ITS INTERPRETATION OF SECTION 12 OF THE CLAYTON ACT

If this Court were to depart radically from its past practices to consider an issue never before the Court below, it should conclude that the District Court properly interpreted Section 12 of the Clayton Act. In its order denying defendants' motion to dismiss, the District Court essentially adopted the holding of the Third Circuit in *Auto. Refinishing*, 358 F.3d 288 (3rd Cir. 2004). Pet. App. 6a. In *Auto Refinishing*, the court correctly concluded that the usual rules of syntax weigh in favor of construing Section 12 as providing separate rules for service of process and venue. 358 F.3d at 295. Moreover, such a reading of the statute comports with "the basic, historic difference between these discrete concepts and what is required for their satisfaction." *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1179-80 (9th Cir. 2004).

In light of this construction, plaintiffs can properly rely on both the Alien Venue Statute and on the second clause of 15 U.S.C. §22 to establish a court's personal jurisdiction over a defendant based on a minimum contacts analysis considering

their contacts with the United States as a whole. *Auto Refinishing*, 358 F.3d at 293. Accordingly, Petitioners' request for issuance of a writ should be denied.

CONCLUSION

This Court should reject Petitioners' request for review of the First Circuit's discretionary refusal to accept their interlocutory appeal, a decision lying in that court's complete discretion. Even if this Court were to review this discretionary denial, it should conclude that the court below did not err and deny the instant petition for writ of certiorari.

Respectfully submitted.

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February 2, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No.__

IN RE NEW MOTOR VEHICLES CANADIAN
EXPORT ANTITRUST LITIGATION

GEORGE C. JAYNES, *et al.*

Plaintiffs, Appellees,

v.

DAIMLERCHRYSLER CANADA INC. and
MERCEDES-BENZ CANADA INC.,

Defendants, Appellants

DEFENDANT DAIMLERCHRYSLER CANADA INC.
AND MERCEDES-BENZ CANADA INC.'S
PETITION FOR PERMISSION TO APPEAL
AN INTERLOCUTORY ORDER OF THE
DISTRICT COURT FOR THE DISTRICT OF MAINE

NOW COME the Defendants DaimlerChrysler Canada Inc. ("DC Canada") and Mercedes-Benz Canada Inc. ("MB Canada" and collectively "Appellants") and, pursuant to Fed. R. App. P. 5 and 28 U.S.C. § 1292(b), request permission to appeal an interlocutory ruling and in support thereof state as follows:

INTRODUCTION

Appellants seek to appeal the decision of the District Court of Maine holding that DC Canada was subject to the personal jurisdiction of that Court and deferring its decision on MB

Canada's motion to dismiss pending jurisdictional discovery. The Order was based on at least two distinct controlling issues of law and were this Court to overrule the District Court it would terminate the action as to the Appellants.

Moreover, there is a substantial ground for a difference of opinion as to both of these issues. As an initial matter, the Court incorrectly held that Plaintiffs could establish personal jurisdiction over DC Canada and MB Canada, by virtue of Section 12 of the Clayton Act without first establishing venue under this statute. Recognizing that the First Circuit has not addressed this issue and that other circuits have reached conflicting and contrary results, the Court certified this Order for interlocutory appeal based on this question.

Additionally, the District Court's finding that sufficient "minimum contacts" could be established under a novel jurisdictional theory is potentially inconsistent with established precedent and has been rejected by multiple state court judges presiding over the state counterparts to this action. While this was not the basis of the District Court's decision to certify the Order, this issue is also now within the jurisdiction of this Court.

In light of these issues which are of critical import to this action and this Circuit at large, Appellants respectfully request that this Court grant permission to appeal the Order so that these issues may be resolved prior to the continued litigation of this action.

FACTS NECESSARY TO UNDERSTAND THE QUESTION PRESENTED

Plaintiffs, who purport to represent consumers located throughout the U.S.,[1] allege that beginning in January 2001,

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[1] Plaintiffs filed lawsuits in a number of jurisdictions, which were then consolidated by the Judicial Panel on Multidistrict Litigation before the Honorable D. Brock Hornby.

various automotive companies headquartered in Germany, Japan, Canada and the United States, as well as two trade associations located in Canada and Virginia, entered into an amorphous and multi-tiered "series of agreements" designed to prevent the export of new cars sold in Canada into the United States. (First Amended Consolidated Complaint at ¶¶ 1-6 ("Compl.")).[2] As a result of the alleged series of agreements, Plaintiffs aver that the wholesale price of new cars to authorized United States dealers increased. (Compl. If 51). In turn, Plaintiffs allege that the price of new cars to consumers located in the United States, who purchased or leased from authorized dealers, was also higher. (Compl. ¶¶ 2, 51). As part and parcel of this alleged conspiracy, Plaintiffs appear to contend that Canadian Defendants, including DC Canada and MB Canada, presumably "sought and obtained" certain agreements from their respective Canadian dealers to discourage the retail export of Canadian vehicles to the United States. (Compl. ¶¶ 3(a), 4).

The Amended Consolidated Complaint contains no jurisdictional allegations specific to the Appellants, or for any Canadian Defendant for that matter. The complete absence of such basic jurisdictional allegations is not an oversight. The evidence before the trial court established that DC Canada (a Canadian corporation based in Toronto, Ontario) does not market, sell, or distribute new vehicles outside the borders of Canada. (Affidavit of Garnet Fenn ("Fenn Aff.")).[3] While DCMC, DC Canada's indirect parent company, purchases

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[2] For the convenience of the Court should it wish to check the cited references, and in light of the fact that the District Court record is still in the District Court, a copy of the first Amended Consolidated Complaint is attached hereto as Exhibit A.

[3] For the convenience of the Court, the Affidavit of Garnet Fenn and the Affidavit of David Leigh, which were before the District Court and remain in the District Court and which are cited herein, are attached as Exhibits B and C, respectively.

new vehicles from DC Canada, those sales are made in Canada, and DCMC is the sole importer of record for those vehicles. (Fenn Aff. ¶ 8).

Similarly, MB Canada has never sold or distributed new vehicles anywhere in the United States. *See* attached Affidavit of David Leigh ("Leigh Aff.") at ¶ 7. Rather, Mercedes-Benz USA, LLC, MB Canada 's sister company, at all times relevant to this lawsuit, held the exclusive right to market, advertise, and distribute at wholesale to dealers, Mercedes-Benz vehicles in the United States.

On March 4, 2004, the District Court denied DC Canada's motion to dismiss for lack of personal jurisdiction and deferred MB Canada's motion pending jurisdictional discovery. Appellants moved to amend the Order to certify for interlocutory appellate review by this Court. On April 20, 2004, the District Court granted in part Appellants' motion and certified the Order for interlocutory appeal.[4] Specifically, the Court found that its conclusion that "Clayton Act § 12 permits worldwide service of process upon alien corporate defendants in antitrust cases" was a controlling issue of law upon which there was a substantial ground for a difference of opinion and that an interlocutory appeal may materially advance the termination of the litigation as to the Appellants. Appellants now bring this Petition for permission to appeal to this Court.

QUESTIONS PRESENTED

1. Can Plaintiffs establish jurisdiction over the Appellants by virtue of Section 12 of the Clayton Act without first establishing venue under this statute?

2. Can jurisdiction over Appellants be established under a novel theory of minimum contacts based on (a) the transfer of

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[4] As required under Fed. R. App. P. 5(b)(1)(E), a copy of the order on the motions to dismiss and a copy of the order certifying that order for interlocutory appeal are attached as Exhibits D and E, respectively.

cars in Canada for ultimate shipment into the United States by a sister or parent corporation when those cars were unrelated to Plaintiffs' alleged injury and (b) entry into non-export agreements solely in Canada?[5]

REASONS WHY THE APPEAL SHOULD BE ALLOWED AND IS AUTHORIZED BY A STATUTE OR RULE

The Court of Appeals may, in its discretion, permit an appeal to be taken from an interlocutory order when a district court has certified that the order (1) involves a controlling question of law; (2) an immediate appeal would materially advance the ultimate termination of the litigation; and (3) there exists substantial ground for difference of opinion with respect to rulings set forth in the order. *Donatelli v. National Hockey League*, 893 F.2d 459, 461 (1st Cir. 1990) (Court of Appeals reviews order finding the existence of personal jurisdiction on interlocutory appeal); 28 U.S.C. 1292(b). The District Court has certified that the Order meets this standard, therefore, Appellants respectfully request that the Court permit an appeal of the Order.

I. The Question of Law at Issue is Controlling

"[I]t is clear that a question of law is 'controlling' if reversal of the district court's order would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) (citing J. Moore & B. Ward, 9 Moore's Federal Practice If 110.22(2), at 268 (1990)). Moreover, "an order may involve a controlling question of law if it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter." *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996). For this reason, courts have "granted certification

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[5] As discussed more fully below, although the District Court only certified a single issue for interlocutory appeal, if it accepts the appeal, this Court will have jurisdiction over all issues in the Order.

when the order involved issues of in *personam* and subject matter jurisdiction." *Klinghoffer*, 921 F.2d at 24; *see also Donatelli*, 893 F.2d 459 (interlocutory review of district ruling denying motion to dismiss for lack of personal jurisdiction).

Reversal of either of two bases for jurisdiction addressed by this Petition would lead to dismissal of this cause of action against the Appellants.

Accordingly, the issues raised by this Petition contain "controlling questions" under 1292(b). *See In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004) (reviewing interlocutory appeal based on correct interpretation of Clayton Act § 12); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987) (granting leave to appeal and reversing decision by district court finding personal jurisdiction based on out-of-forum transfers to an in-forum distributor).

II. An Interlocutory Appeal would Materially Advance the Ultimate Termination of the Litigation

"The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 830 F. Supp. 1549 (D. N.J. 1993) (citing 16 C. Wright, A. Miller, E. Cooper, E. Gressman, Federal Practice & Procedure § 3930, at 163 (1977)). *Max Daetwyler Corp. v. Meyer* is instructive on this issue. 575 F. Supp. 280 (E.D. Pa. 1983). There, the court found that an interlocutory appeal of a personal jurisdiction ruling would materially advance the ultimate termination of the litigation where the "Court of Appeals would presumably direct dismissal of the suit if it disagreed with my analysis of jurisdiction" and thus avoid "extensive discovery, employment of expert witnesses, and investigation of numerous complex legal issues." *Id.* at 282

(permitting appeal of certified order regarding use of national contacts analysis).[6] Likewise, in this instance, a reversal by this Court would, in fact, terminate this litigation as to these parties and save these parties from the burdensome expense of what could be a lengthy and complicated litigation. As the District Court found, this finding is sufficient to satisfy the requirements of 28 § 1292(b).

Moreover, the District Court noted that allowing an appeal would not result in any material delay to on-going proceedings or otherwise impede the progress of the underlying case as Appellants have agreed to accept any rulings litigated in this matter while this issue is on appeal. Therefore, Plaintiffs are free to pursue litigation fully against remaining defendants, including DC Canada's parent entities and MB Canada's sister corporation.

III. There is a Substantial Ground for Difference of Opinion on Each of the Bases Supporting the Court's Jurisdictional Finding

In finding that DC Canada was subject to personal jurisdiction, the District Court made at least two significant rulings. The basis for both of these rulings is subject to a substantial ground for difference of opinion.[7]

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[6] If Defendants were required to litigate this matter to a final judgment prior to having the opportunity to appeal and the First Circuit at that time determined that this Court's ruling was constitutionally infirm, Defendants would be left with no remedy for the considerable costs of litigating an action they rightfully should never have been a part of. *See*, e.g., *Max Daetwyler Corp.*, 575 F. Supp. at 282-83 (finding any concern over delay or potential for multiple appeals was outweighed by cost of permitting matter to proceed to trial only to have case later dismissed by Court of Appeals on jurisdictional grounds).

[7] Commentators have suggested that "the level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case. If proceedings that threaten to endure for several years depend on an initial

A. There is a Split Amongst the Circuits as to the Interpretation of Section 12 of the Clayton Act

The District Court correctly held that there is substantial ground for difference of opinion in regard to its holding that "the second, worldwide service clause of Section 12 [of the Clayton Act] is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with the alien venue statute." Order at 5. Section 12 of the Clayton Act provides that:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 12 (1997). As the District Court noted, courts have struggled with the meaning of "in such cases" in the second clause of this section. Order at 4. Indeed, the District Court pondered whether "'such cases' mean antitrust lawsuits against a corporate defendant? Or does it mean only antitrust cases against a corporate defendant that meet all the criteria of the first clause, i.e., where venue is established on the criteria set forth there?" *Id.*

As the District Court also recognized "[u]ntil last month, there was an even split of the other Circuits," and the "First Circuit has not spoken on the issue." Order at 4. The District Court adopted the position of the Third Circuit and the Ninth Circuit, which found that "such cases" meant only "antitrust cases against a corporate defendant." However, ample author-

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question of jurisdiction . . . certification may be justified at a relatively low threshold of doubt." 16 Fed. Prac. & Proc. Juris.2d § 3930 (citing *Brown v. Texas & Pacific Railroad Co.*, 392 F. Supp. 1120, 1125 (W.D. La. 1975) and *Atlantic City Elec. Co. v. General Elec. Co.*, 207 F. Supp. 613, 620 (S.D.N.Y. 1962)).

ity may also be cited for the reverse proposition, i.e., that "such cases" means cases where venue has been properly established. *See GTE New Media Services, Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1350-51 (D.C. Cir. 2000) (finding that national service under Section 12 is available only in "such cases" where plaintiffs first establish venue under that statute); *see also Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), rev'd on other grounds, 369 U.S. 463 (1962); *Management Insights, Inc. v. CIC Enterprises, Inc.*, 194 F. Supp. 2d 520, 532 (N.D. Tex. 2001).[8]

Indeed, the existence of this split between the circuits presumably led the Third Circuit to review this precise issue on interlocutory appeal as well. *See In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004). It was for these reasons that the District Court correctly found that there was a substantial ground for difference of opinion as to the scope of Section 12 of the Clayton Act.[9]

B. Because Jurisdictional Principles Enunciated by the Supreme Court and First Circuit Conflict with the District Court's Subsidiary Jurisdictional Findings, An Additional Issue Presents Substantial Ground for Difference of Opinion

Although the District Court opted to base its certification of the Order on only one of the issues presented in Appel-

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[8] To determine the appropriateness of interlocutory review at this stage, this Court need only determine that a "substantial ground for difference of opinion" exists; the Court need not find that reversal on this issue is likely. *Brown v. Texas & Pac. Railroad Co.*, 392 F. Supp. 1120, 1125 (W.D. La. 1975).

[9] This decision is also 'supported by the decisions of the Eastern District of Pennsylvania and the Third Circuit Court of Appeals in *Max Daetwyler Corp.* to respectively certify and permit an appeal of the similar question of whether the court properly used a "national contacts" analysis to evaluate personal jurisdiction in a federal question suit against an alien defendant. 575 F.Supp. at 283 (certifying appeal where decision was based on choice between conflicting authority); *Max Daetwyler Corp.*, 762 F.2d 290 (permitting appeal).

lants' motion to certify, this Court is still permitted to review any issue presented in the Order. *Yamaha Motor Corp., U.S.A., et al v. Calhoun*, 516 U.S. 199, 205 (1996). Indeed the Supreme Court has specifically held that an "appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* (citing 9 J. Moore & B. Ward, Moore's Federal Practice ¶ 110.25[1], p. 300 (2d ed.1995)). Therefore, Appellants submit an additional controlling question which is also the subject of a substantial ground for a difference of opinion and would also be the subject of an appeal to this Court.

The District Court appeared to recognize that traditional theories of specific jurisdiction do not apply to Appellants. Thus, the court held that the allegation that is the "focus of the complaint"—that vehicles sold by Canadian dealers were prevented from leaving Canada—does not support personal jurisdiction over the Canadian defendants. Order at 22. Nor do the activities of U.S. corporations related to the Canadian defendants support personal jurisdiction. Order at 16, n. 6. And finally, the District Court appears to acknowledge that the traditional "stream of commerce" theory, which requires more than the mere manufacture of a product that finds its way to the United States, does not apply. Instead, the court extended the stream of commerce doctrine to circumstances where (a) some products are manufactured and title is transferred outside the United States, (b) those products are then imported by, and distributed under the control of a corporate relative, and (c) other products are withheld from the United States:

> "In most cases, personal jurisdiction attaches because items are put directly into forums' stream of commerce. In this case, the focus of the complaint is that items are withheld. Although companies can withhold items to avoid being subject to jurisdiction, cf. Burger king etc., withholding some while sending others may constitute

> activity directed toward a forum that is sufficient to sustain specific jurisdiction."

Order at 17, n.8. Appellants acknowledge that they transfer some products in Canada that find their way into the United States. Because Appellants have no ability to direct those products to the United States, and because Plaintiffs' alleged injuries do not arise from those products, the requirements of the stream of commerce test are not met. The novel theory of the District Court appears to hold that personal jurisdiction may nevertheless attach where there is a combination of contacts, no one of which would be constitutionally sufficient. [10]

The District Court's novel articulation of this stream of commerce theory is constitutionally deficient. Under First Circuit law, "[t]he relatedness requirement is not met merely because a plaintiff's cause of action arose out of the general relationship between the parties; rather, the action must directly arise out of the specific contacts between the defendant and the forum state." *Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1995) (emphasis added); *US. v. Swiss American Bank, Ltd.*, 274 F.3d 610, 622 (1st Cir. 2001) (defendant's in-forum contact must cause the injury or give rise to the cause of action). As Plaintiffs' claim bears no, or at best, only an ancillary relationship to DC Canada's sole jurisdictional contact, jurisdiction cannot lie.

The stream of commerce theory most typically arises in products liability situations where a foreign manufacturer, with no direct connection with the forum itself, negligently manufactures a product that later causes bodily injury to a

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[10] Moreover, MB Canada transfers such vehicles only sporadically. (Leigh Aff. ¶ 9). Such sporadic transfers do not constitute "purposeful availment" under any scenario as "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale." *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 117 (1987).

consumer in a distant forum. Because the forum contacts by the manufacturer are already highly attenuated in these types of situations, the product itself and the act of placing that product in the distribution chain are not merely connected in some fashion to the plaintiff's cause of action—they form the basis of the plaintiffs' cause of action in the first instance. Indeed, as stated in World-Wide Volkswagen, the product itself is the "source of injury to its owner or to others." 444 U.S. 286, 297 (1980) (emphasis added).

Plaintiffs here cannot, and do not, contend that the vehicles DC Canada transferred in Canada constitute the "source" of their injuries. Rather, as found by the Minnesota Court in Lerfald, *infra*, Plaintiffs complain solely about the vehicles DC Canada did not transfer. (Compl. ¶ 1). Indeed, as evidenced by the claims against other Canadian defendants who did not transfer vehicles to related U.S. entities, Plaintiffs still would have suffered their alleged injuries whether or not DC Canada manufactured or transferred vehicles in Canada. *See Swiss American Bank*, 274 F.3d at 622 (contact deemed unrelated where it is not essential to plaintiff's claim). Rather than bear any relation to the Plaintiffs' claims, if anything, the fact that DC Canada transferred vehicles for ultimate resale into the U.S. would negate Plaintiffs' injury, which resulted because of fewer, not more, vehicles in the U.S.

Moreover, unlike plaintiffs in products liability actions, Plaintiffs here do not claim there was something inherently defective or dangerous about DC Canada's vehicles when they left Defendants' control. Rather, Plaintiffs complain that the price of all vehicles—regardless of their point of origin—were inflated at the retail level. (Compl. IT 1, 51). By definition, the retail price was set long after the vehicle left DC Canada's facilities, nor is there any allegation that DC Canada charged an inflated transfer price to its indirect parent. Thus, unlike the typical products liability action where the

product is defective at all times throughout the chain of distribution, the alleged higher "price" could not and did not travel in the stream of commerce. Accordingly, because Plaintiffs' claim is that "defendants rigged a scheme to inflate [the product's] price," not that "there was anything defective" about the way in which DC Canada's vehicles were manufactured, stream of commerce jurisdiction cannot be invoked. *In re Lupron Mktg. and Sales Practices Litigation*, 245 F.Supp.2d 280, 301 (D. Mass. 2003).

Given the lack of direct relationship between DC Canada's forum "contact" and Plaintiffs' cause of action, the District Court appeared to recognize that stream of commerce theory, as traditionally applied, was not applicable here. Instead, the District Court formulated a novel theory of relatedness based on the fact that "evidence of targeted distribution and non-export agreements . . . ensure that only the higher priced version of the same product can be sold to American consumers." Order at 19. The District Court's attempt to articulate some link between DC Canada's placement of vehicles into a stream of commerce to Plaintiffs' alleged injury however, does not meet the *Sawtelle* Court's requirement that the alleged injury arise *directly* from a defendant's jurisdictional contact.

First, the District Court 's use of non-export agreements to connect Plaintiffs' injury with DC Canada's jurisdictional contact only confirms that Plaintiffs' injury, to the extent it arose directly from any alleged conduct of DC Canada, arose out of those agreements rather than from the fact it placed vehicles in the stream of commerce. In this regard, the District Court rightly acknowledged that such non-export agreements are not constitutionally cognizable "contacts" for jurisdictional purposes; instead, the District Court correctly noted that a manufacturer is entitled to place limits on its distribution so as to avoid jurisdiction. Order at 22. As. applied to DC Canada, however, the District Court offered no explanation as

to how an allegation of *preventing* products from entering the U.S. can possibly be the apparent keystone of a novel species of the stream of commerce doctrine.

Likewise, the District Court's emphasis on the fact that Plaintiffs' purchased a "higher priced version" of vehicle also confirms the lack of any direct nexus between DC Canada's jurisdictional contact and Plaintiffs' alleged injury. DC Canada is not alleged to have sold its vehicles to its indirect parent at a supracompetitive price, which was in turn passed along to Plaintiffs. Thus, to the extent Plaintiffs' did pay an inflated price for their vehicles, it was as a direct result of the pricing actions of DC Canada's indirect parent. In that regard, the District Court correctly found that it would be improper to otherwise impute these actions of the indirect parent to DC Canada. Order at 16, n. 6. Here, too, the District Court failed to explain how such imputation would otherwise be proper in the context of its newly-articulated stream of commerce theory.

In sum, the District Court recognized (a) that DC Canada's transfer of vehicles to its indirect parent alone was insufficient to confer jurisdiction; (b) that acts in Canada to prevent cars sold in Canada from being resold in the U.S. were insufficient to support jurisdiction; and (c) that DC Canada could not be held to the acts, including necessarily, pricing actions, of its indirect parent. Thus, the District Court's articulation of its new stream of commerce theory appears to be constructed on the novel premise that these elements, when combined, are somehow greater than the sum of its parts. These factors, however, even when combined, are not equivalent to placement of products into the stream of U.S. commerce nor to any purposeful availment of the privilege of conducting activities in the United States, and cannot make the exercise of jurisdiction over DC Canada satisfy due process. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). Because the District Court 's treatment of this issue

differs in fundamental ways from the established jurisprudence of this Circuit and threatens to significantly expand the scope of stream of commerce jurisdiction, there is also a substantial ground for a difference of opinion on this issue. *See Donatelli*, 893 F.2d at 460 (1st Circuit allowing interlocutory appeal where court was "impressed by the issue's novelty and importance").

CONCLUSION

DC Canada and MB Canada respectfully request that this Court grant their request to appeal the District Court's Order.

Dated: May 4, 2004

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-8006

IN RE NEW MOTOR VEHICLES CANADIAN
EXPORT ANTITRUST LITIGATION

GEORGE C. JAYNES, ET AL.,
Plaintiffs-Respondents,

v.

DAIMLERCHRYSLER CANADA INC. AND
MERCEDES-BENZ CANADA INC.,
Defendants-Petitioners

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DAIMLER CHRYSLER CANADA, INC. AND MERCEDES-BENZ CANADA INC.'S PETITION FOR PERMISSION TO APPEAL AN INTERLOCUTORY ORDER OF THE DISTRICT COURT FOR THE DISTRICT OF MAINE

Pursuant to Federal Rule of Appellate Procedure 5 and 28 U.S.C. § 1292(b), Plaintiffs-Respondents submit this memorandum of points and authorities in opposition to Defendants-Petitioners DaimlerChrysler Canada, Inc. ("Daimler Canada") and Mercedes-Benz Canada, Inc.'s ("Mercedes Canada") Petition for Permission to Appeal an Interlocutory Order of the District Court for the District of Maine (the "Petition").

I. INTRODUCTION

In their Petition, Defendants-Petitioners seek to distract the Court from the weakness of their argument for interlocutory review by engaging in evidentiary disputes irrelevant to the question at hand. The critical question for this Court to determine whether or not to permit an appeal to proceed is whether the certified Order is final, concerns a controlling question of law whose resolution will materially advance the litigation, and involves legal conclusions about which there exists substantial debate. Because Defendants-Petitioners fail to meet this stringent standard, their Petition should be rejected.

As a preliminary matter, the Petition for interlocutory review is premature in that the certified Order makes no conclusive determination as to the rights or liabilities of Mercedes Canada. Indeed, the District Court explicitly deferred any ruling on the question of its jurisdiction over this Defendant. Until such a ruling, any interlocutory review of the District Court's conclusions with regard to Mercedes Canada is premature, as it potentially could be moot.

The certified Order does not involve any controlling question of law, in that it conclusively disposes of the jurisdictional issue as to only Daimler Canada, which is but one of the seventeen Defendants in this case. Even in the unlikely event that this Court reverses the District Court's jurisdictional determination as to this sole Defendant, such a ruling cannot possibly speed the termination of this litigation. Regardless of Daimler Canada's participation in this suit, virtually identical evidentiary and legal issues would remain to be litigated.

Similarly, the certified Order implicates no difference of legal opinion sufficient to permit an appeal to proceed. The District Court's careful opinion adopted the recent exhaustive analysis of the Third Circuit Court of Appeals on the issue of

jurisdiction under Section 12 of the Sherman Act. Because this analysis reflects the wisdom of the majority of circuit courts that have taken up this question, the certified Order involves no substantial difference in legal opinion.

Moreover, there is nothing novel about the District Court's use of the time-honored minimum contacts standard in determining its jurisdiction over Daimler Canada. Defendants-Petitioners' argument concerning whether the District Court properly considered some of their activities in making its determination amounts to simple second-guessing of the District Court's application of the appropriate legal standard. Such claims are not appropriate for the exceptional review afforded under Section 1292(b).

Finally, even if the Court were to permit an appeal of the March 4, 2004 Order to proceed, Plaintiffs-Respondents would then urge that the Court overturn the District Court's misguided refusal to find jurisdiction over all the Defendants on the basis of the conspiracy theory of jurisdiction. Because jurisdiction under such a theory is well accepted in New York—the venue of origin of one of the transferred cases—the District Court was obliged to find jurisdiction in the transferee venue.

II. PROCEDURAL HISTORY

In their First Amended and Consolidated Complaint ("FACC"), plaintiffs allege that Mercedes Canada, Daimler Canada, and other American and Canadian automobile manufacturers and trade associations conspired with United States and Canadian automobile dealers to prevent new motor vehicles purchased in Canada from entering the U.S. FACC at ¶¶ 1-6, 23-45. The FACC alleges that by means of this conspiracy, the named Defendants suppressed and restrained interbrand competition for new motor vehicles, maintained U.S. new motor vehicle prices at artificially high levels, and

restricted the supply and/or output of new motor vehicles in the U.S. FACC at ¶¶ 77.

In motions to dismiss dated October 31, 2004, Mercedes Canada and Daimler Canada moved to dismiss this case for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). In a 26-page Memorandum Decision and Order on Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, dated March 4, 2004 ("Mem. Dec."), the District Court denied Daimler Canada's motion and deferred ruling on Mercedes Canada's motion. Mem. Dec. at 2-3. The District Court concluded that "the second, worldwide service clause of Section 12 is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with an alien venue statute." Mem. Dec. at 5. The Court then observed that, with regard to Daimler Canada, the evidence showed that Daimler Canada dealers entered into non-export agreements with their consumers, that Daimler Canada sent a notice to dealers on both sides of the border that vehicle distribution outside the "dealer network" was prohibited, and that Daimler Canada would not provide warranty coverage for vehicles exported from Canada to the U.S. Mem. Dec. at 19. The District Court concluded that these activities met the standard for personal jurisdiction set out in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), and further determined that the gestalt factors set out in *Ticketmaster-New York v. Alioto*, 26 F.3d 201, 207 (1st Cir. 1994) aligned in support of jurisdiction over Daimler Canada. Mem. Dec. at 18-19.

As to Mercedes Canada, the District Court held that "I *defer* action on Mercedes-Benz Canada's 12(b)(2) motion to dismiss for lack of personal jurisdiction pending jurisdictional discovery on the scope of sales of Mercedes Benz-Canada vehicles into the American market (through Mercedes-Benz USA) and concerning the scope of the

Mercedes-Benz non-export agreements for Canadian vehicles." Mem. Dec. at 23-24.

III. QUESTIONS PRESENTED

1. Should this Court permit the appeal of an Order that finally determines jurisdiction over only one of seventeen named Defendants?

2. Should this Court permit the appeal of an Order that presents no controlling question of law and whose resolution will not materially advance the litigation of this case?

IV. REASONS WHY APPEAL SHOULD NOT BE PERMITTED

While a district court must make the threshold determination to certify an order for interlocutory appeal pursuant to 28 U.S.C. § 1292, this Court determines for itself whether it will permit an appeal pursuant to that provision. *Ultra-Precision Mfg. Ltd. v. Ford Motor Co.*, 338 F.3d 1353, 1358 (Fed. Cir. 2003); *see also Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 46 n.7 (1st Cir. 1988) (noting one aspect of the regimen set forth in Section 1292(b) is that "[T]he mechanism permits the Court of Appeals to protect its docket by determining for itself whether to accept the issue for review.") (citation, internal quotations omitted). This determination lies within this Court's discretion. *Ultra-Precision*, 338 F.3d at 1358. Even if the criteria for certification are present, a court may, in its discretion, deny certification. *Wm. Passalacqua Builders, Inc. v. Resnick Develop. South, Inc.*, 611 F. Supp. 281, 284 n.2 (S.D.N.Y. 1985).

Because Defendants-Petitioners are unable even to show that the certified Order is final, much less that it satisfies the controlling question and substantial debate requirements under Section 1292(b), their Petition for interlocutory appeal should be rejected.

A. The Certified Order is Not Final as to Mercedes Canada

The Petition is fatally defective because the Order that it seeks to appeal is not ripe for review. In *Paschall v. Kansas City Star Co.*, 605 F.2d 403, 406 (8th Cir 1979), the Eighth Circuit Court of Appeals held:

> While it might be conceivable that an issue includes a controlling question of law, and while it might be seemingly apparent that it is a difficult question as to which there is a substantial ground for difference of opinion, and while a decision thereon might materially advance the ultimate outcome, the case must be of sufficient ripeness so that this can be determined from the record. The purpose of section 1292(b) is not to of fer advisory opinions "rendered on hypotheses which (evaporate) in the light of full factual development." Consideration of the factual basis must be such that a sound premise exists upon which the legal issues can be determined with precision.

(Citation omitted.)

The District Court explicitly deferred ruling on Mercedes Canada's motion to dismiss pending the results of jurisdictional discovery. In the absence of such discovery and of any final disposition of Mercedes Canada's motion, it is impossible to determine on this undeveloped record whether the certified Order in fact implicates a controlling question of law. Depending on the results of the discovery, the District Court may grant Mercedes Canada's motion, in which case its appeal of the certified Order would be moot. Alternatively, jurisdictional discovery may produce evidence that Mercedes Canada had sufficient contacts with a relevant state to justify personal jurisdiction without resorting to the District Court's interpretation of the venue and service provisions of Section 12 of the Clayton Act. Indeed, if the Court elected to permit Mercedes Canada to appeal, the only decision relating to

Mercedes Canada that would be capable of review is the District Court's determination that it would let jurisdictional discovery proceed, a conclusion reviewed only for abuse of discretion. *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 39 (1st Cir. 1992).

B. The Petition Fails to Satisfy the Requirements of Section 1292(b)

Even if the certified Order were ripe, Defendants-Petitioners have failed to satisfy any of the requirements for interlocutory appeal under Section 1292(b). In order to pursue an interlocutory appeal, Defendants-Petitioners must demonstrate to this Court that the order sought to be reviewed: (a) "involves a controlling question of law as to which" (b) "there is substantial ground for difference of opinion," and (c) "that an immediate appeal from the order may materially advance the ultimate tennination of the litigation." 28 U.S.C. § 1292(b); *In re Ulpiano Unanue Casal*, 998 F.2d 28, 32 (1st Cir. 1993). As the parties urging the appeal, Defendants-Petitioners have the burden of satisfying all three factors. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-75 (1978). Defendants-Petitioners' failures to satisfy each of these factors provide independent bases for denying their Petition for review.

1. Defendants-Petitioners Have Not Demonstrated that the Certified Order Contains a "Controlling Question of Law" whose Resolution Would "Materially Advance" this Litigation

There is substantial overlap in this Court's analysis of whether the certified Order involves a controlling question of law and whether the resolution of this question would materially advance the litigation. *In re Bank of New England Corp.*, 218 B.R. 643, 654 n.21 (1st Cir. 1998) (The element of materially advancing the litigation "overlaps the 'controlling question of law' factor, in that both are directed toward

assuring that interlocutory review will advance the resolution of the underlying action."). Defendants-Petitioners must show that interlocutory review under Section 1292 could reverse a ruling that is "serious to the conduct of the litigation." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3rd Cir. 1974). If the contours of a case will be essentially the same in terms of the scope of discovery or the length and complexity of the trial, appeal should not be permitted. *Bank of New York v. Hoyt*, 108 F.R.D. 184, 189 (D.R.I. 1985); *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 855 F. Supp. 438, 440 (D. Me. 1994). While Defendants-Petitioners proffer two supposed controlling questions in their Petition, neither withstands analysis.

First, Defendants-Petitioners argue that the District Court's assertion of jurisdiction over Daimler Canada alone among seventeen Defendants presents a controlling question of law. As authority for this proposition, they cite, *inter alia*, *Donatelli v. Nat'l Hockey League*, 893 F.2d 459 (1st Cir. 1990), in which this Court was asked to review a District Court's order refusing to dismiss Donatelli's case against the National Hockey League ("NHL") for lack of jurisdiction. *Id.*. While the Court of Appeals permitted an interlocutory appeal in that instance, the NHL was the sole defendant in that case. *Id.* Unlike the motion in *Donatelli*, however, Daimler Canada's motion to dismiss in this case cannot result in the termination of this litigation. Instead, even if the District Court's Order were upheld, the case would proceed against the remain ing sixteen Defendants. Daimler Canada has not, and cannot, point to any diminution in the length of discovery or trial that might result from their dismissal from this case. Because the "basic contours" of this case would thus be unchanged as a result of an interlocutory appeal, the Petition must be denied. *Bank of New York*, 108 F.R.D. at 189.

Defendants-Petitioners similarly fail in their attempt to elicit a controlling question of law from the District Court's

determination that Daimler Canada's contacts with the U.S. were sufficient to establish in *personam* jurisdiction. The essence of Defendants-Petitioners' argument on this point is that the District Court improvidently based its jurisdictional findings on, among other things, the fact that Daimler Canada sent notices to dealers in the U.S. stating that Daimler would not provide warranty coverage for vehicles exported from Canada to the U.S. Petition at 6; Mem. Dec. at 19. Defendants-Petitioners' argument amounts to a disagreement with the Court over the manner of the District Court's application of the national contacts test, not on what law to apply. Such a dispute is not an appropriate subject for the extraordinary. measure of interlocutory review. *McGillicuddy v. Clements*, 746 F.2d 76, 77 n.l (1st Cir. 1984) (Interlocutory review is appropriate only "where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority.").

Defendants-Petitioners' attempt to demonstrate a controlling question in the certified Order is further doomed for the reason that the Order itself is not even final. As discussed above at 4, the District Court explicitly deferred ruling on Daimler Canada's motion pending jurisdictional discovery. Mem. Dec. at 26. Section 1292(b) does not permit the appeal of decisions whose finality turns on further development of the factual record. *Paschall*, 605 F.2d at 406 (holding that "The purpose of section. 1292(b) is not to offer advisory opinions 'rendered on hypotheses which (evaporate) in the light of full factual development') (citation omitted).

2. There is No Substantial Difference of Legal Opinion on the Bases Underlying the District Court's Jurisdictional Rulings

Neither the District Court's well-founded reading of Section 12 of the Clayton Act nor its common-sense application of the personal jurisdiction test set out in *World-Wide Volkswagen* invoke any substantial difference of legal opin-

ion. Demonstration of a substantial difference of legal opinion requires satisfaction of a stringent standard: "[n]either disagreement outside the Circuit, nor the mere presence of a disputed issue that is a question of first impression in this Circuit demonstrate a substantial ground for difference of opinion" required for interlocutory appeal. *In re MTBE Products Liab. Litig.*, 174 F. Supp. 2d 4, 8 (S.D.N.Y. 2001) (noting that "[S]ection 1292(b) is not intended to be a 'vehicle to provide early review of difficult rulings in hard cases.'") (citation omitted). Indeed, so long as the District Court's "conclusion is supported by other courts . . . there is no substantial difference of opinion warranting an exception to the general policy against piecemeal appellate review embodied in the final judgment rule." *Id.* (internal quotations omitted). Because the District Court correctly adopted the most widely accepted reading of Section 12 of the Clayton Act, no substantial difference of opinion exists as to its determination of this issue. Furthermore, Defendants-Petitioners' quarrel with the District Court's application of the *World-Wide Volkswagen* test amounts to a disagreement over the result of the test's application to these facts, rather than which test should appropriately be applied.

a. Analysis of Section 12 of the Clayton Act

Although Defendants-Petitioners assert a split among the circuits as to the interpretation of Section 12 of the Clayton Act, the disagreement they point to is between an obsolescent minority view, on one hand, and the current, most widely accepted understanding of that section, on the other. In its March 4, 2004 Order, the District Court found, consistent with the Ninth and Third Circuits, that "the second, worldwide service, clause of Section 12 is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with the alien venue statute [§1391(b)]." Mem. Dec. at 3-5 (citing *Go-Video, Inc. v. Akai Elec. Co. Ltd.* 885 F.2d 1406, 1413 (9th Cir. 1989)); *In re*

Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 292-93 (3rd Cir. 2004.) Because the District Court's opinion is thus supported not only by "other courts," but also by a majority of circuit courts to have considered this issue, there is no substantial dispute about its conclusions. *MBTE*, 174 F. Supp. 2d at 8.

While Defendants-Petitioners argue that the District Court's view is contrary to the position taken by the District of Columbia Circuit in *GTE New Media Servs. v. Bell South Corp*, 199 F.3d 1343, 1350 (D.C. Cir. 2000), that case adds little to their position. In *GTE*, the D.C. Circuit relied heavily on the Second Circuit's 40-year old decision in *Goldlawr Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), in determining that Section 12's venue requirement must be satisfied before its expansive jurisdictional provision may be invoked. *GTE*, 199 F.3d at 1351 (noting that "[W]e align ourselves with the position taken by the Second Circuit.") (citation omitted). However, the Second Circuit itself has cast doubt on the continuing vitality of this doctrine. Indeed, in addressing the interpretation of Section 12 in *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 207 (2d Cir. 2003), the Second Circuit makes no mention of *Goldlawr*. *Id.* Instead, it observes that the proper interpretation of Section 12 is in dispute, citing, *inter alia*, *Go-Video*, 885 F.2d at 1413, and *In re Vitamins Antitrust Litig.*, 94 F. Supp. 2d 26, 27 n.3, 30 (D.D.C. 2000) (questioning wisdom of D.C. Circuit's interpretation of Section 12 to require that a defendant be an inhabitant of, be found in, or transact business in a forum before being subject to worldwide service of process in a multidistrict, antitrust suit). This difference of opinion between a single, outlying circuit court and the majority of circuit courts who have taken up this issue is not a "substantial difference of opinion" that could warrant interlocutory review. *MBTE*, 174 F. Supp. 2d at 8.

b. The National Contacts Analysis

Defendants-Petitioners' search for a substantial difference of legal opinion in the District Court's national contacts analysis is similarly fruitless. Though Defendants-Petitioners disagree with the *results* of the Court's analysis, their Petition identifies no substantial difference of opinion regarding the authority relied upon by the District Court warranting interlocutory review.[1]

In determining whether it could exercise specific jurisdiction over all of the Canadian Defendants, the District Court set forth each step of its analysis, in accordance with prevailing authority. Mem. Dec. at 11-12. The District Court first considered whether Defendants' conduct was purposefully directed at the forum and whether the alleged injuries arise from that contact (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The District Court next discussed purposeful availment, voluntariness, foreseeability (*citing U.S. v. Swiss Am. Bank, Ltd.*, 274 F. 3d 610, 621 (1st Cir, 2001)), and reasonableness (*citing Asahi Metal Industry Co. v. Super. Ct.*, 480 U.S. 102, 113-16 (1987)). Defendants-Petitioners point to no differences of law concerning these authorities.

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[1] Defendants-Petitioners' citation to *Lerfald v. GM*, No. CT 03-003327 (Minn. Dist. Ct. Nov. 7, 2003), is inapposite. In *Lerfald*, the court determined whether Canadian defendants had sufficient contacts with *Minnesota* warranting the exercise of personal jurisdiction. Here, the Court must determine whether there are sufficient contacts with the U.S.—an analysis invoking a distinct standard. In any event, because a determination by the Minnesota court does not constitute controlling authority for the purposes of the District Court's analysis, *Lerfald* cannot give rise to a substantial difference of legal opinion. Moreover, Defendants-Petitioners fail to point out that at least two other state courts in related cases have ruled differently. In Wisconsin, the court permitted jurisdictional discovery as to all of the Canadian defendants except CADA (*Rasmussen v. General Motors*, No. 03-cv-1828). In Florida, the court permitted jurisdictional discovery on all of the Canadian defendants (*Beckford v. General Motors*, No. 03-6463).

In concluding that it could exercise specific jurisdiction over Daimler Canada, the District Court looked beyond the fact that Daimler Canada prevented automobiles manufactured in Canada from being exported to the U.S. Petition at 13. Rather, the District Court considered an array of conduct targeted towards U.S. markets. Among other things, the District Court looked to: (a) Daimler Canada's two-tiered distribution system; (b) its website touting the integration of its global and North American operations; (c) its use of no-export agreements designed to keep Canadian cars out of the U.S. market; (d) its communication with its dealers in both the U.S. and Canada on ways to keep cars out of the U.S. market; and (e) its refusal to honor warranties for cars sent into the U.S. market. Mem. Dec. at 18-20. Such activities directed toward the U.S. routinely give rise to personal jurisdiction. *U.S. v. Nippon Paper Indus., Co., Ltd.*, 109 F. 3d 1, 2 (1st Cir. 1997). For example, *In Nippon Paper*, the Court considered whether it could exercise personal jurisdiction over defendants whose conduct took place entirely outside the U.S., but was intended to produce, and did in fact produce, some substantial effect in the U.S. The *Nippon Paper* court concluded "the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One's jurisdictional reach." *Id.* at 4. In light of this conclusion, there is no "substantial difference of opinion" that could justify interlocutory review of the District Court's specific jurisdictional findings.

V. CONCLUSION

Defendants-Petitioners have not met their heavy burden of establishing that this Court should grant their Petition for appeal under Section 1292(b). They have not shown that there are any controlling questions involving substantial differences of opinion that would materially advance the litigation if the extraordinary measure of interlocutory review is granted.

Accordingly, Plaintiffs-Respondents respectfully request that the Petition be denied in its entirety.

Dated: May 12, 2004

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 15 2005
OFFICE OF THE CLERK

No. 04-736

IN THE

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DAIMLERCHRYSLER CANADA, INC. AND MERCEDES-BENZ CANADA, INC.,

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v.

GEORGE JAYNES, ET AL.,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. This Court Clearly Can And Should Review The Merits Of The Clayton Act Section 12 Issue That The First Circuit, Unlike Its Sister Circuits, Refused To Address On Interlocutory Appeal. 2

II. The Proper Interpretation Of Section 12 Of The Clayton Act Is An Important Issue That Is Ripe For This Court's Review. 6

III. Review By This Court Is Warranted Given The Well-Developed Circuit Split That Exists And The Substantial Constitutional, Policy, and International Comity Implications That It Raises. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Pages

CASES

Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174 (9th Cir. 2004) 4, 9

American Construction Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U.S. 372 (1893) 7

Aro Manufacturing Co., Inc. v. Automobile Body Research Corp., 352 F.2d 400 (1st Cir. 1965) 5

Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 (1934) 7

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967) 8

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 4

Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843 (11th Cir. 1988) 4

Gialde v. Time, Inc., 480 F.2d 1295 (8th Cir. 1973) 4

Goldlawr, Inc. v. Heiman, 288 F.2d 579 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962) 4

Go-Video, Inc. v. Akai Electric Co., Ltd., 885 F.2d 1406 (9th Cir. 1989) 4

GTE New Media Servs. Inc. v. Bellsouth Corp., 199 F.3d 1343 (D.C. Cir. 2000) 4, 9

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916) 7

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 7

In re Automobile Refinishing Paint Antitrust Litigation, 358 F.3d 288 (3d Cir. 2004) 4, 9

Kraus v. Board of County Road Commissioners, 364 F.2d 919 (6th Cir. 1966) 4

Minnick v. California Dep't of Corrections, 452 U.S. 105 (1981) 5

Paschall v. Kansas City Star Co., 605 F.2d 403 (8th Cir. 1979) 8

Simmons v. West Haven Housing Authority, 399 U.S. 510 (1970) 5

Southern Ry. Co. v. King, 217 U.S. 524 (1910) 3

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 8

STATUTES

28 U.S.C. § 1254 3

28 U.S.C. § 1292 4

28 U.S.C. § 2101 4

OTHER AUTHORITIES

Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1959) 4

REPLY BRIEF FOR PETITIONER

Petitioners DaimlerChrysler Canada, Inc. ("Daimler Canada") and Mercedes-Benz Canada, Inc. ("Mercedes Canada") respectfully file this reply to the brief in opposition filed by Respondents. Respondents do not contest the existence of a deep and lingering circuit split regarding the proper interpretation of Section 12 of the Clayton Act. Nor do they address the important constitutional, policy, and international comity and commerce implications of interpreting Section 12 to allow antitrust plaintiffs to sue a foreign corporation in any federal district court anywhere in the United States, not only under the federal antitrust laws, but also the laws of any of the fifty States that give rise to factually related and "pendent" state-law claims. *See, e.g.*, Petition at 22-27; Brief of Amici Curiae The Organization for International Investment and the Association of International Automobile Manufacturers In Support of Petitioners ("OFII/AIAM Brief") at 2-3, 6-11.

Rather, Respondents attempt to distract this Court from authoritatively resolving this important question of federal statutory law with a barrage of supposed procedural obstacles and inapt cases, none of which withstands scrutiny or prevents this Court from restoring stability to the legal environment for international commerce.

That the First Circuit failed to address this pure and controlling question of law on interlocutory appeal, unlike nearly every other federal Circuit that has been presented with it, does not prevent this Court from doing so. Because this Court could decide the merits of the Section 12 issue before any judgment had been rendered in the First Circuit, it clearly could do so where, as here, there *has* been a judgment from the Court of Appeals.

Unlike the cases relied upon by Respondents, the resolution of the question presented here would not benefit from, or be affected by, deferring review until the entry of final judg-

ment in this case. No further facts or law remain to be developed before the question posed by Petitioner Daimler Canada is squarely presented for this Court's review, because the District Court unconditionally denied Daimler Canada's motion to dismiss several months ago. The jurisdictional discovery that has taken place since then and that Respondents repeatedly cite as a reason for denying the petition for certiorari in this case could only affect Mercedes Canada's challenge to the District of Maine's assertion of personal jurisdiction over it. Yet surely if this Court concluded that Section 12 does not authorize the assertion of personal jurisdiction over Daimler Canada in Maine based only on Daimler Canada's aggregate minimum contacts with the United States as a whole, then Mercedes Canada should also be entitled to the benefit of such a conclusion. It is for that reason that Mercedes Canada has joined in Daimler Canada's petition to this Court for a writ of certiorari.

Finally, deferring review until the entry of final judgment in this case would defeat the very purpose of the defenses of personal jurisdiction and venue, which exist to protect defendants from the burden of having to defend suit in a forum with which they do not have sufficient minimum contacts or in which it would be unfair to require the defendants to appear generally. The threshold nature of these defenses provides yet another reason not to delay review of the pure question of law presented in this case.

I. This Court Clearly Can And Should Review The Merits Of The Clayton Act Section 12 Issue That The First Circuit, Unlike Its Sister Circuits, Refused To Address On Interlocutory Appeal.

1. Respondents are wrong in asserting that this Court cannot and should not review the merits of the controlling question of law presented—a question as to which there is substantial ground for difference of opinion and that was certified by the District Court here: namely, whether the second clause of Section 12 should be torn apart from the first clause of the sentence of which it is a part and combined with other

general venue statutes to permit antitrust plaintiffs to sue foreign corporations in any federal district court anywhere in the United States. *See, e.g.*, Respondents' Brief in Opposition ("Opp.") at 4-5 and n.2 (citing *Southern Ry. Co. v. King*, 217 U.S. 524 (1910), for the proposition that "if this Court were to reverse the First Circuit's ruling, it could only command that court to accept the certified order for review on the merits").

Southern Ry. Co. v. King provides no support (and Respondents offer no alternative support) for such an artificial and inefficient constriction of this Court's authority to resolve the statutory interpretation question presented in this case. In *Southern Ry. Co.*, this Court affirmed the lower courts' rejection of the defendants' Commerce Clause challenge to Georgia's railroad-crossing statute because the defendants did not adequately plead facts sufficient to raise such a challenge. *See* 217 U.S. at 536-37.[1] Here, in contrast, there is no suggestion that Petitioners inadequately pleaded the facts underlying their challenge to the District of Maine's exercise of personal jurisdiction over them. And nothing in *Southern Ry. Co.* addresses this Court's power to reach the merits of an issue certified for interlocutory appeal by a district court, nor does anything else in that case suggest that this Court cannot reach the merits of Petitioners' personal jurisdiction challenge here.

This Court undoubtedly could have decided the merits of the Section 12 issue raised in Petitioners' interlocutory appeal, even before the First Circuit entered its judgment in this case refusing to do so. *See* 28 U.S.C. § 1254(1) ("Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .") (emphasis added); 28

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[1] *See Southern Ry. Co. v. King*, 217 U.S. 524, 536-37 (1910) ("But these averments [in defendants' amended answer] are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional.").

U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."). Because this Court could have decided the merits of the Section 12 issue even before any judgment had been rendered by the First Circuit, this Court clearly has the power to do so where, as here, a judgment *has* been rendered by the Court of Appeals. Pet. App. 1a.[2]

2. This Court should exercise its power to decide the merits of the Section 12 issue not only because the standard prescribed by 28 U.S.C. § 1292(b) for an interlocutory appeal has been satisfied here, as nearly every other Circuit presented with the identical Section 12 question has determined,[3] but also because of the sharp conflict of authority

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[2] Respondents also cite dicta in this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978), as well as the Sixth Circuit's decision in *Kraus v. Board of County Road Commissioners*, 364 F.2d 919 (6th Cir. 1966), and the Eighth Circuit's decision in *Gialde v. Time, Inc.*, 480 F.2d 1295 (8th Cir. 1973), for the obvious point that the discretion of a Court of Appeals to entertain an interlocutory appeal under 28 U.S.C. § 1292(b) is broad. *See* Opp. at 5-6 and n.3. But outer-bound limits on the exercise of such discretion undoubtedly exist. *See, e.g.*, Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 346 and n. 112 (1959) (citations omitted) (suggesting that "[a] refusal of the court of appeals to allow application for appeal under § 1292(b) might thus be remedied by mandamus when discretion was abused.").

[3] *See In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 290 (3d Cir. 2004) (interlocutory appeal); *GTE New Media Servs. Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1345 (D.C. Cir. 2000) (same); *Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1407 (9th Cir. 1989) (same); *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 580 (2d Cir. 1961) (same), *rev'd on other grounds*, 369 U.S. 463 (1962); *see also Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1176 (9th Cir. 2004) (on appeal of district court's dismissal of lawsuit); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th

amongst the Circuits on this question, the commercial and legal importance of the question, and the fact that further proceedings in the District Court will not result in any further factual or legal development of the threshold defense of lack of personal jurisdiction, at least as to Daimler Canada.

The cases Respondents cite in support of their contention that this Court should not review the Section 12 issue at this time are off-point and readily distinguishable. *See* Opp. at 7-12. In each of those cases, the analogous question that this Court was asked to review simply was not presented at all, or its resolution clearly would have been significantly altered by further factual development in the courts below.

In *Simmons v. West Haven Housing Authority*, for example, this Court dismissed an appeal raising an equal protection challenge to a Connecticut statute that purportedly required indigent tenants to post a bond in order to appeal from a judgment in a summary eviction proceeding. The Court dismissed the case because it appeared that petitioner was denied waiver of the bond requirement for the independent reason that the appeal of summary eviction was "taken only for purpose of delay." 399 U.S. 510, 513 (1970) (per curiam) (citing 250 A.2d 527 (1968)). Here, there is no ambiguity as to why the District Court denied Daimler Canada's motion to dismiss for lack of personal jurisdiction.

Similarly, in *Minnick v. California Dep't of Corrections*, this Court declined to hear petitioners' challenge to the affirmative-action program that the California Department of Corrections had started to implement, because it was unclear whether such a challenge was even properly, let alone squarely, presented. 452 U.S. 105, 123-27 (1981). First, it was uncertain whether the trial court even had jurisdiction over the claims that had been asserted by petitioners in that case. *See id.* at 119 and n. 25, 126. Second, it was impossi-

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[Footnote continued from previous page]

Cir. 1988) (same); *Aro Manufacturing Co., Inc. v. Automobile Body Research Corp.*, 352 F.2d 400, 402 (1st Cir. 1965) (same).

ble to tell from the lower courts' opinions "whether race was considered relevant for *all* promotions or just in connection with promotions to particular positions." *Id.* at 125. Further factual findings were needed for an analysis of either alternative under the Equal Protection Clause, and further development of the record was expected to occur in a new trial ordered by the court below. *See id.* Again, here, in contrast, Petitioners undoubtedly had the right to challenge personal jurisdiction in the District of Maine, and at least Daimler Canada's challenge is squarely presented to this Court without the necessity of further proceedings below.

II. The Proper Interpretation Of Section 12 Of The Clayton Act Is An Important Issue That Is Ripe For This Court's Review.

1. Respondents wrongly assert that the Clayton Act Section 12 issue presented in this case is not ripe for review and may be mooted by the jurisdictional discovery authorized by the District Court in this case. *See* Opp. at 8-9. The pendency of jurisdictional discovery is a red herring because it was ordered only with respect to Mercedes Canada. The District Court conclusively denied Daimler Canada's motion to dismiss for lack of personal jurisdiction in its March 4, 2004 opinion and order, and it made clear the ripeness of the issue by certifying that order for interlocutory appeal. Pet. App. 17a-20a. Moreover, the District Court has never suggested, either in that order or in any subsequent opinions or statements, that its ruling as to Daimler Canada could possibly be affected by the jurisdictional discovery that it had authorized with respect to Mercedes Canada. Consequently, the record with respect to Daimler Canada's ripe challenge to personal jurisdiction in the District of Maine is fully developed. Because the correct interpretation of Section 12 could materially advance the ultimate termination of this litigation as to not only Daimler Canada but also Mercedes Canada, *see* Pet. App. 27a (District Court order certifying same), Mercedes Canada has joined in Daimler Canada's petition to this Court for a writ of certiorari.

The completeness of the record on the threshold defense of lack of personal jurisdiction sets this case apart from the authority relied upon by Respondents. Unlike *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), or *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934), no further factual development or proceedings in the lower courts could either clarify, or render unnecessary, a decision by this Court on the merits of the overbroad and erroneous interpretation of Section 12 used by the District Court to assert personal jurisdiction over Daimler Canada.

2. Even if Petitioners are ultimately vindicated on the merits of Respondents' antitrust, consumer-protection, and unjust-enrichment claims after a lengthy and costly trial in this complex class-action litigation, the very damage and injury against which the defenses of lack of personal jurisdiction and venue were designed to protect would have been inflicted upon Petitioners. *See* Petition at 27-29 (citations omitted) (explaining that the whole point of these threshold defenses is to protect non-residents from the burden of having to defend suit in the foreign forum).

Because personal jurisdiction is a threshold issue, cases such as *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372 (1893), and *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916), actually support review by certiorari of the Section 12 issue here. Here, "extraordinary inconvenience and embarrassment in the conduct of the cause" would result if Daimler Canada and Mercedes Canada had to wait several years until the conclusion of this complex class-action antitrust litigation to have an appellate court uphold their threshold defense that they never should have been subjected to the burdens of defending suit in the District of Maine. *American Construction Co.*, 148 U.S. at 384. "In such an exceptional case, the power and the duty of this court to require, by certiorari or otherwise, the case to be sent up for review and determination, cannot well be denied." *Id.*; *see also Hamilton-Brown Shoe*, 240 U.S. at 258 (citing *American Construction Co.*). That is why

an interlocutory appeal may be the only procedural vehicle through which the Section 12 issue presented in this case could reach this Court in any reasonably timely fashion.

3. The other cases cited by Respondents involve situations in which further factual development and proceedings in the lower courts would have significantly affected, or possibly obviated the need for, this Court's resolution of the question sought to be reviewed. In *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, review by this Court of the contempt sanctions that had been levied by the district court against the union would have been premature, because the district court had not yet reconsidered whether there actually had been a contempt and, if so, whether the sanctions it had levied were appropriate, as it had been ordered to do by the Court of Appeals. 389 U.S. 327, 328 (1967) (per curiam). In contrast, here, the Court of Appeals did not require the District Court to reconsider or alter its Section 12 ruling, nor has the District Court given any indication that it will do so as to Daimler Canada.

Similarly, in *Virginia Military Institute v. United States*, the District Court had not yet considered the different options for, or ruled upon, the "'specific remedial course'" mandated by the Equal Protection Clause in that case, as it had been required to do by the Court of Appeals. 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari). It therefore made sense for this Court to adhere to its usual policy of "await[ing] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Id.* Here, in contrast, awaiting such final judgment would add nothing to the District Court's ruling on the Section 12 issue that has divided the Circuits and that calls for review by this Court.

The same distinction applies to the Eighth Circuit's dismissal of the interlocutory appeal that it had initially entertained in *Paschall v. Kansas City Star Co.*, 605 F.2d 403 (8th Cir. 1979). In *Paschall*, the district-court record had been so insufficiently developed that it was impossible to tell

whether certain preliminary antitrust-standing defenses would have rendered unnecessary the judicial determination of the Sherman Act Section 2 issue that had been certified for interlocutory appeal. *See id.* at 407. Here, in contrast, there are no such preliminary hurdles to the Section 12 issue that have been erroneously decided by the District Court.

III. Review By This Court Is Warranted Given The Well-Developed Circuit Split That Exists And The Substantial Constitutional, Policy, and International Comity Implications That It Raises.

Respondents' only direct response to the Section 12 issue presented in this case, and the well-developed 3-2 circuit split that exists on this issue, is a conclusory and fleeting reference to the flawed "syntax" analysis of the Third Circuit in *In re Automobile Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004), and to the "'basic, historic difference'" between venue and service of process mentioned in the Ninth Circuit's decision in *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1179 (9th Cir. 2004). *See* Opp. at 12.

However, neither of these references comes close to refuting the existence of the deep circuit and district-court split on the proper interpretation of Section 12 described in the Petition and the OFII/AIAM Brief, the compelling textual analysis offered by courts such as the District of Columbia Circuit in *GTE New Media Servs.*, or the significant constitutional, policy, and international comity and commerce considerations that militate in favor of this Court's review. *See* Petition at 8-29; *id.* at 19-20 n. 10 (explaining the flaw in the syntactical analysis adverted to in *In re Automobile Refinishing Paint Antitrust Litigation*); OFII/AIAM Brief at 3 (explaining how the "vast and unwarranted expansion of both the district courts' jurisdiction and the potential liability of foreign corporate defendants under the laws of the 50 states, including states with which these entities have no contacts," wrought by an incorrect interpretation of Section 12, would "impose an unfair and disproportionate burden on foreign

corporations"); *id.* at 6 (noting that "[t]he conflict and confusion among the lower courts denies businesses the ability to manage or limit risk by making deliberate decisions about where they will incorporate or transact business").

As *amici curiae* OFII/AIAM have correctly observed, this Court should grant review to make clear that "Congress must act more explicitly than it has in Section 12 of the Clayton Act to impose" upon foreign corporations a "legal environment" that subjects them to suit in any district court anywhere in the United States, under not only the federal antitrust laws, but also the laws of any of the fifty States that give rise to factually related and "pendent" state-law claims. OFII/AIAM Brief at 8.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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February 15, 2005

(3)

Supreme Court, U.S.
FILED
FEB 2 - 2005
OFFICE OF THE CLERK

No. 04-736

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CANADA, INC. AND MERCEDES-BENZ CANADA, INC.,

Petitioners,

v.

GEORGE JAYNES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF THE *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE CONFLICT AMONG THE CIRCUIT COURTS REGARDING SECTION 12 OF THE CLAYTON ACT THREATENS THE STABILITY OF THE LEGAL ENVIRONMENT FOR INTERNATIONAL BUSINESS	5
II. THIS COURT SHOULD GRANT CERTIORARI TO AVERT A VAST EXPANSION OF JURISDICTION AND LIABILITY FOR FOREIGN CORPORATE DEFENDANTS, AND TO AVOID UNFAIRLY AND DISPROPORTIONATELY BURDENING INTERNATIONAL COMMERCE	7
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

Action Embroidery Corp. v. *Atlantic Embroidery, Inc.*, 368 F.3d 1174 (9th Cir. 2004) 5, 6
Asahi Metal Indus. Co. v. *Superior Court*, 480 U.S. 102 (1987) 9, 10, 11
In re Automotive Refinishing Paint Antitrust Litig., 358 F.3d 288 (3d Cir. 2004) 5
Ballard v. *Blue Shield of S. W. Va., Inc.*, 543 F.2d 1075 (4th Cir. 1976) 5
Board of County Comm'rs v. *Wilshire Oil Co. of Tex.*, 523 F.2d 125 (10th Cir. 1975) 5
Delong Equip. Co. v. *Washington Mills Abrasive Co.*, 840 F.2d 843 (11th Cir. 1988) 5
GTE New Media Servs. Inc. v. *Bellsouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000) 5
General Elec. Co. v. *Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982) 10
Go-Video, Inc. v. *Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989) 5
Goldlawr, Inc. v. *Heiman*, 288 F.2d 579 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962) 6
World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 8

STATUTES

15 U.S.C. § 22 ..... 3, 4, 7
28 U.S.C. § 1391 ..... 4, 10

OTHER AUTHORITY

16 James W. Moore et al., *Moore's Federal Practice* (3d ed. 2004) 6

BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37.2(a) of the Rules of this Court, the Organization for International Investment and the Association of International Automobile Manufacturers respectfully submit this brief as *amici curiae* in support of Petitioners seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are business associations with a substantial interest in the creation and enforcement of stable and predictable legal standards governing the conduct of international trade and investment.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

The Association of International Automobile Manufacturers ("AIAM") is an independent business association representing the interests of international automobile companies that import or manufacture motor vehicles in the

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for either party has authored this brief in whole or in part. This brief is filed under Supreme Court Rule 37.2(a) with the consent of both parties, and copies of the letters indicating consent have been filed with the Clerk of the Court.

United States. AIAM represents manufacturers that account for approximately 30 percent of the passenger cars and light trucks sold annually in the United States. AIAM also represents original equipment suppliers and other auto-related trade associations.

Amici view the jurisdiction and venue rulings at issue in this case as a serious threat to their members' interests in a stable, predictable, and fair legal environment for foreign commerce and investment in the United States. These rulings also jeopardize the affiliates of *amici*'s members that transact business around the world. The decision below would vastly expand the exposure of *amici*'s members and their affiliates to suit in jurisdictions with which they have no contacts. It would expose *amici*'s members and their affiliates to potential "pendent" liability under the laws of every one of the 50 states, including states in which they do no business or have any contact. *Amici*'s abiding need to know with some certainty what their risks are in conducting business that has global implications provides a compelling reason for this Court to grant the petition in this case. At a minimum, *amici*'s perspective will assist this Court in evaluating the worthiness of the petition for review by the Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

DaimlerChrysler Canada, Inc. and Mercedes-Benz Canada, Inc. ("Petitioners") have petitioned for certiorari from the U.S. Court of Appeals for the First Circuit's unreported order declining review of the district court's jurisdiction and venue rulings under Section 12 of the Clayton Act. That order effectively places the First Circuit in the camp of three other Circuits that have read Section 12's two parts as wholly unrelated. Two other Circuits—the District of Columbia and the Second—would have dismissed this lawsuit. Accordingly, the First Circuit has exacerbated the already deep split among the courts of appeals regarding the proper

interpretation of Section 12. Petitioners also argue that the decision below raises significant constitutional and international comity concerns that can be avoided by instead accepting the plain meaning of the statute. *Amici* agree with Petitioners' arguments and urge the Court to grant the petition for the reasons stated therein. It is simply intolerable to have the outcome of cases turn solely on the forum-shopping whims of plaintiffs or their counsel.

In this brief, *amici* in support of this Court's review offer their unique perspective on the negative consequences of both the circuit split and the judgment below for international trade with and investment in the United States. First, the circuit split poses a serious threat to the stability of the legal environment for international business. Second, the rulings below result in a vast and unwarranted expansion of both the district courts' jurisdiction and the potential liability of foreign corporate defendants under the laws of the 50 states, including states with which these entities have no contacts. Third, by so expanding this jurisdictional exposure and potential liability, the rulings below impose an unfair and disproportionate burden on foreign corporations, contrary to this Court's express policy regarding the exercise of personal jurisdiction over foreign persons and entities. These burdens threaten long-term harm not only to foreign corporate defendants but also to U.S. companies doing business abroad and to U.S. foreign policy.

ARGUMENT

The core legal issue in this case is whether Section 12 of the Clayton Act, 15 U.S.C. § 22, should be applied based on its plain meaning or, alternatively, whether the two dependent clauses of Section 12 should be torn apart and applied independently—with striking implications for venue, jurisdiction and substantive liability for defendants in antitrust actions.

Section 12 of the Clayton Act provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22.

The First Circuit declined to review on interlocutory appeal the district court's decision to adopt the countertextual interpretation of Section 12 adopted by the Third, Ninth and Eleventh Circuits, and to reject the contrary interpretation of the Second and District of Columbia Circuits. Pet. App. 1a. The district court here found that the phrase "in such cases" in the second clause of Section 12 refers not to cases that meet the criteria for venue set forth in the first clause, but simply to "[a]ny suit, action, or proceeding under the antitrust laws against a corporation." *Id.* at 4a-6a. The court thereby severed the connection between the jurisdictional and venue provisions under Section 12, concluding that the jurisdictional provision could be used in conjunction not only with Section 12's venue provision, but also with the broader alien venue provision under 28 U.S.C. § 1391(d). *Id.* at 6a. The latter provision states that "[a]n alien may be sued in any district." 28 U.S.C. § 1391(d). The court analyzed the jurisdiction exercised under Section 12 based on the defendants' contacts "with the United States as a whole" because jurisdiction was based on a federal statute. Pet. App. 6a-7a.

Combining the broad jurisdictional provision under Section 12 with the expansive alien venue provision permits plaintiffs to "sue an alien corporate defendant in federal court anywhere in the United States ... and serve that defendant anywhere in the world," Pet. App. 5a, subject only to a capacious "national contacts" analysis. Foreign corporate defendants that meet

the "national contacts" test could thus be haled into court anywhere in the United States, at the plaintiff's sole discretion. This result has stark negative consequences for international commerce and investment and warrants review by this Court.

I. THE CONFLICT AMONG THE CIRCUIT COURTS REGARDING SECTION 12 OF THE CLAYTON ACT THREATENS THE STABILITY OF THE LEGAL ENVIRONMENT FOR INTERNATIONAL BUSINESS.

A deep and irreconcilable conflict exists among the Circuits regarding the interpretation of Section 12 of the Clayton Act. The Third, Ninth and Eleventh Circuits have endorsed the disturbingly overbroad interpretation adopted below that permits suit against foreign corporate defendants anywhere in the United States and authorizes service of process anywhere in the world. See *Go-Video, Inc.* v. *Akai Elec. Co.*, 885 F.2d 1406, 1408-15 (9th Cir. 1989); *Action Embroidery Corp.* v. *Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1177-80 (9th Cir. 2004); *In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 292-99 (3d Cir. 2004); *Delong Equip. Co.* v. *Washington Mills Abrasive Co.*, 840 F.2d 843, 848 (11th Cir. 1988).[2] In sharp contrast, the Second Circuit and the D.C. Circuit have adopted a narrower interpretation, based on the statute's plain meaning, under which the second clause of Section 12 permits worldwide service only "in such cases" where the venue requirements set forth in the first clause have been met. See *GTE New Media Servs. Inc.* v. *Bellsouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) ("The language

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[2] As Petitioners have noted, the Fourth and Tenth Circuits have similarly concluded that the worldwide service provision under Section 12 may be paired with venue provisions other than that in Section 12, although their approaches arguably are distinguishable from those of the Third, Ninth and Eleventh Circuits. Pet. 15-16; *see also Ballard* v. *Blue Shield of S. W. Va., Inc.*, 543 F.2d 1075 (4th Cir. 1976); *Board of County Comm'rs* v. *Wilshire Oil Co. of Tex.*, 523 F.2d 125 (10th Cir. 1975).

of the statute is plain, and its meaning seems clear ... invocation of the nationwide service clause rests on satisfying the venue provision."); *Goldlawr, Inc.* v. *Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962). This indisputable circuit split has led to unpredictable and conflicting outcomes in the district courts. See Pet. 19-22.

The conflict and confusion among the lower courts denies businesses the ability to manage or limit risk by making deliberate decisions about where they will incorporate or transact business. The circuit conflict thus threatens the stable and predictable legal environment that is required for the operation of multinational businesses in the United States and for a healthy commercial and economic environment. *Amici*'s members reasonably depend upon predictable legal rules to operate their businesses effectively and manage their risks prudently. The disagreement among the lower courts denies them this predictable framework and creates perverse incentives to forum-shop by plaintiffs seeking to exploit the sharp differences among the lower courts in their approaches to jurisdiction and venue in antitrust cases.

The harms inherent in this unstable legal regime are exacerbated by the courts' power in most circuits to assert personal jurisdiction over "pendent" claims under state law. See, *e.g.*, *Action Embroidery Corp.*, 368 F.3d at 1180-81 (court asserting personal jurisdiction under Section 12 of Clayton Act may also assert personal jurisdiction over ancillary state law claims); see also 16 James W. Moore et al., *Moore's Federal Practice* § 108.123[2][d] (3d ed. 2004). Under the doctrine of ancillary jurisdiction, plaintiffs in federal antitrust actions may concurrently prosecute "pendent" state law claims that would otherwise have fallen beyond the limits of the applicable state long-arm statute. See *Action Embroidery Corp.*, 368 F.3d at 1180.

Defendants' potential exposure to pendent claims under state law will vary enormously depending on which of the

conflicting interpretations of Section 12 of the Clayton Act is chosen by the presiding court in a particular case. If a court takes the narrower interpretation of Section 12, then personal jurisdiction and venue will both be limited under the section's first clause to those districts in which a corporation "is an inhabitant," "may be found," or "transacts business." 15 U.S.C. § 22. Defendants thus would be subject to pendent state claims only under the laws of states in which those criteria were met. If a court takes the overbroad interpretation adopted below, however, then entities that maintain minimum "national contacts" may be haled into court anywhere in the United States and also may be subject to pendent claims under the laws of any one of the 50 states.

The circuit split thus means that businesses are unable to predict where jurisdiction and venue will be found for federal antitrust claims and, what is worse, whether they may be subject to myriad potential pendent state law claims that plaintiffs may pursue in any of the 50 states. At a minimum, this Court should grant the petition and resolve the conflict regarding Section 12 to provide businesses with certainty as to whether establishing contacts in a single U.S. state may consequently subject them to suit under the laws of all 50 states, including states in which they do no business whatsoever.

II. THIS COURT SHOULD GRANT CERTIORARI TO AVERT A VAST EXPANSION OF JURISDICTION AND LIABILITY FOR FOREIGN CORPORATE DEFENDANTS, AND TO AVOID UNFAIRLY AND DISPROPORTIONATELY BURDENING INTERNATIONAL COMMERCE.

While *amici* are gravely concerned about the existing conflict regarding jurisdiction and venue in federal antitrust law, they are even more troubled by the implications of the overbroad interpretation of Section 12 of the Clayton Act left intact by the First Circuit. This approach creates serious risks for the conduct of national and global commerce.

The interpretation of Section 12 in effect embraced by the First Circuit would vastly expand the jurisdictional power of the district courts over foreign corporate defendants in antitrust actions. Departing from Section 12's plain meaning and treating its jurisdictional and venue provisions as independent permits the pairing of Section 12's worldwide service of process provision with the nationwide alien venue provision under 28 U.S.C. § 1391(d). The troubling result is that plaintiffs "can sue an alien corporate defendant in federal court anywhere in the United States" and can "serve that defendant anywhere in the world." Pet. App. 5a. With jurisdiction subject only to the minimal protection of the "national contacts" analysis, alien corporate defendants are left without any meaningful safeguards to protect them from being haled into court in any location—and under any law—that the plaintiff may choose. Whether Congress has the power to adopt such a draconian regime is a difficult issue, but surely Congress must act more explicitly than it has in Section 12 of the Clayton Act to impose such a legal environment.

This vast expansion of the district courts' jurisdictional powers risks discouraging foreign corporations, like AIAM members and OFII members' affiliates, from pursuing or expanding their investment activities in the United States that benefit both foreign and domestic commerce. Like all business entities, these corporations carefully calibrate their business decisions and operations in each market to manage exposure to risks, including the risk of litigation. The constitutional and statutory framework governing personal jurisdiction is designed to protect persons and business entities from the unreasonable risk of litigation, particularly treble damages or punitive damage liability. See, *e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980) ("The Due Process Clause ... gives a degree of predictability ... that allows potential defendants to structure their primary conduct with some minimum assurance as to

where that conduct will and will not render them liable to suit.") (citation omitted). This framework is also designed to be sensitive to the "unique burdens" placed on foreign defendants. See, *e.g., Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching ... personal jurisdiction over national borders."). The overbroad interpretation of Section 12 effectively prevents foreign companies from managing litigation risk, because minimum contacts anywhere will render them subject to suit everywhere in the United States. The disproportionate risk necessarily will discourage foreign investment in this country.

The potential exposure of foreign corporate defendants in federal antitrust actions to ancillary claims under state law presents an even greater disincentive to foreign trade and investment in the U.S. market. Under the scheme endorsed by the courts below, it would not be sufficient for a company seeking to trade or invest in one U.S. state to ensure its compliance with that state's particular business laws and regulations. Rather, it would need to allocate resources sufficient to protect against potential claims under the laws of all 50 states, even if it does business only in one. Even a minimal effort to reduce litigation risk would require a survey of the applicable state laws and precautionary measures to comply with the most onerous rules likely to be asserted by the most opportunistic or imaginative plaintiffs. The costs and risks of doing business in the United States thus would rise steeply and would serve to deter foreign companies from investing or trading in the U.S. market—to the detriment of both the domestic economy and international commerce.

The Court also should intervene in this case to forestall the imposition of unwarranted and discriminatory burdens on foreign corporations and international commerce. The overbroad interpretation of Section 12 of the Clayton Act

endorsed by the courts below would render foreign corporations much more vulnerable to suit—and to liability for remedies such as treble damages—than their domestic counterparts. The decision below severs Section 12's jurisdictional and venue provisions, permitting its jurisdictional clause to be paired with other venue provisions imported from other statutes. For alien corporations with minimum "national contacts," the result is that an action may be brought in any district court in the United States, based on the worldwide service provision in Section 12 in combination with the general venue provision that "[a]n alien may be sued in any district." 28 U.S.C. § 1391(d). For domestic corporations, however, the result of severing Section 12's two clauses is far less stark, because the applicable venue rules are more restrictive. See *id.* § 1391(b)-(c); see also *General Elec. Co.* v. *Bucyrus-Erie Co.*, 550 F. Supp. 1037, 1041 (S.D.N.Y. 1982) ("The general venue provision of section 1391 governing such domestic corporations is, in contrast to section 1391(d) governing alien corporations, *more* difficult to satisfy than the section 12 venue requirements."). Severing the clauses of Section 12 and applying alternative general venue provisions thus places foreign corporations, such as AIAM's members and OFII's members' affiliates, at a significant disadvantage vis-à-vis their domestic counterparts.

Courts embracing the broader reading of Section 12 of the Clayton Act have failed to identify a legal or policy rationale that justifies this disparate treatment of foreign corporations. They fail to explain why Section 12 should be read in a manner that is so clearly contrary to this Court's stated views concerning the exercise of personal jurisdiction over alien persons or corporations. See, *e.g.*, *Asahi Metal Indus. Co., Ltd.*, 480 U.S. at 115 ("'[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field'") (citations omitted).

The courts that have adopted the overbroad reading of Section 12 not only lack an affirmative justification for

disproportionately burdening foreign corporations—they also ignore the negative repercussions of doing so for U.S. foreign policy and U.S. companies doing business abroad. What this decision simply disregards is that lack of restraint in the exercise of jurisdiction may well lead courts in other countries to retaliate, or attempt to "level the playing field," by adopting similarly expansive jurisdictional approaches. Such retaliatory actions will harm U.S. companies and the U.S. economy, and introduce friction into U.S. foreign relations.

The expansive approach to jurisdiction in the decisions below, therefore, threatens the nation's interests as a whole. See, *e.g.*, *Asahi Metal Indus. Co., Ltd.*, 480 U.S. at 115 (The Federal Government's interest in its "foreign relations policies[] will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State."). Given the split in the Circuits and the harm to foreign companies embodied in the ruling below, certiorari is plainly warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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February 2, 2005

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